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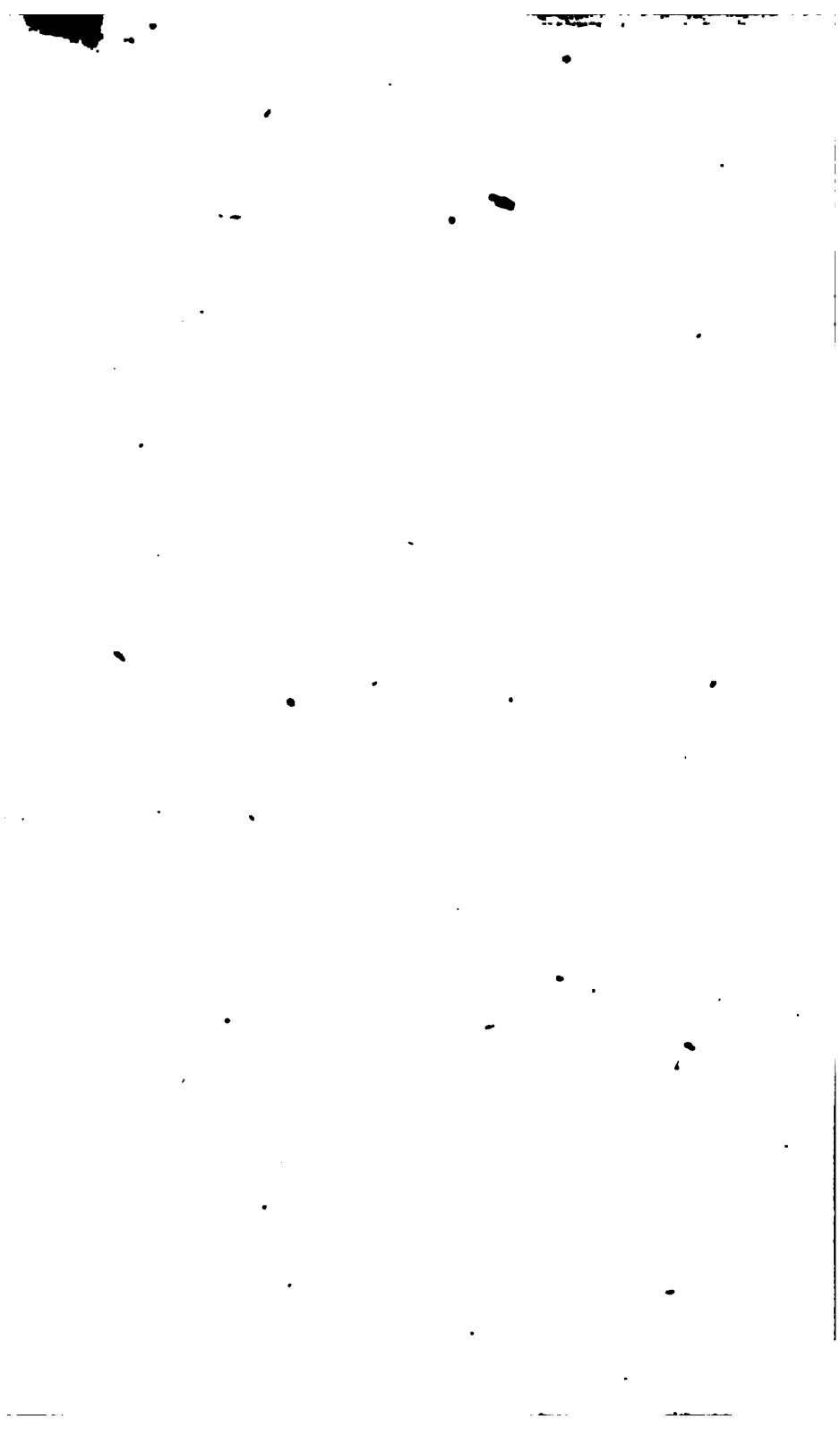


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THE
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ART. I.—THE REGISTRATION OF ASSURANCES BILL.

1. The Registration of Assurances Bill.
2. Registration and Real Property Commission. First Report. 1850.

THE great experiment is at last on the point of being tried. It is highly probable that before the publication of these observations the fiat of the legislature will have established that mighty innovation—an, effectual General Register for all transactions affecting any lands in England or Wales.

In the whole range of subjects which embrace the mode of transmitting and ascertaining the rights to property, there is none that approaches in importance this question of the Registration of Assurances. The view of the question, as it arises in the simplest state of things, viz., where land is always held in absolute right, is very clearly put by the Real Property Commissioners in their Second Report.¹ “In all civilized countries,” they say, “the title to lands depends in a great measure upon written documents. The purchaser looks, and is empowered by law to look, for proof of the seller’s right beyond the mere fact of his possession. It is obvious that a documentary title cannot be complete unless the party to whom it is produced can be assured that no document which may defeat or alter the effect of those which are shown to him is kept out of sight. It follows that means should be afforded by the law for the manifestation of all the documents necessary to complete the title, or for the protection of purchasers against the effect of any documents which, for the want of such means, have not been brought to their knowledge; in other words, that there should be a GENERAL REGISTER.”

¹ Page 2.

In the state of things we have supposed, there can be no doubt that there should be a General Register; but it is quite another question whether, in the state of things which actually obtains, a General Register, now to be introduced for the first time, is expedient or even practicable. Nor are there wanting very important names in the list of those who maintain the inexpediency of such a measure, from the consequences, foreseen and unforeseen, to which it may lead; that even apart from those consequences, the very dread of which is an evil, a General Registry will neither facilitate, nor cheapen the deduction of titles, nor give results more to be relied on than the measures now in use: while not a few, whose opinions, and even whose prejudices, are entitled to be treated with respect, insist, that whatever may be the case at present, all consideration of its expediency will very speedily have to be laid aside, for that any scheme of general registration will be found, after a short time, impossible to be worked; and that a General Register would, in a very few years, be destroyed by its own enormous weight.¹

The great majority, however, of persons qualified to judge, and who have had the whole matter fully before them, are in favour of Registration. The Real Property Commissioners, in 1830, were unanimously in favour of such a measure.² So were the Select Committee of the House of Commons, to whom Lord (then Mr.) Campbell's bill was referred to in 1832,³—unanimous at least as to the advantages in cases of large purchasers, though they spoke dubiously as to its effect upon small estates: and so lastly, are the present Conveyancing and Registration Commissioners, Lords Langdale and Beaumont, Messrs. Bellenden Ker, Coulson, Frere, Humphry and Broderip; the latter two gentlemen differing from their fellow-commissioners only as to the nature of the indexes, and not at all as to the propriety of a Register Office being established. We should feel disposed to bow to so eminent an array of authority, even if the reasons by which they support their opinions failed to convince us. Not only, however, do the reasons advanced by them seem unan-

¹ Sugden, V. and P. p. 997.

² The Commissioners were, Mr. (now Lord) Campbell, Messrs. Tinney, Sanders, Duval, Hodgson, Duckworth, Brodie and Tyrrell.

³ The names were, Mr. Campbell, Lord Morpeth, Sir J. Johnstone, Messrs. Littleton, Blamire, Labouchere, Sandford, Freshfield, Jones, Wood, Vernon, Stephenson, Lord Robert Grosvenor, Mr. Byng, Lord Milton, Lord Sandon, Messrs. Portman, O'Connell, Cutler Fergusson, Spence, J. A. Smith, Wigram, Bonham Carter, W. Brougham, Strickland, Paget, Jephson, Vernon, Burge: to whom were added, on different occasions, Messrs. Loch, Lascelles, Trail, Slaney, Sir Charles Wetherall, Mr. Hervey, Sir H. Williamson, Sir Thomas Freemantle, Mr. Buck, and Mr. Hodgson.—*Comm. Jour.*, lxxxvii. 160, 227.

swerable, but many of the views and anticipations which have hitherto hindered the progress of opinion on this point, and delayed the establishment of a Registry, appear to us to be among the strongest inducements for making the experiment. For an experiment it certainly is : and there can be no certainty of what may be the immediate consequences, far less what may be the remote but not less necessary results, of the change. But so the same may be said of every new occurrence. A man who should be stopped by such a reflection as this could not perform the ordinary functions of life.

It is indeed to the ultimate consequences of a system of General Registration that we look forward as about to furnish the best proof of its utility ; and also the best means of rendering the Register itself more simple and cheap. The reforms in Conveyancing which the Registry will, we hope, be the means of introducing, will, probably, in their turn, afford opportunities for the gradual formation of a more perfect system of Registration than in the present state of the theory and practice of the Law of Real Property it is possible to establish. This was also felt by the late Real Property Commissioners ; they commence their remarks upon the subject of Registration, which occupies the whole of their Second Report (1830, xviii., Parl. Papers), by observing " that this subject appeared to them to exceed in magnitude and importance all the other subjects within the scope of their Commission ; that it had excited general interest ; and they had found it to be so connected with almost every part of the Law of Real Property that the nature and details of any improvements to be suggested must greatly depend on the question, whether all deeds and instruments affecting the title were to be registered, or whether the security of titles was still to rest on other expedients." The experience of a General Register will, it is hoped, suggest, and render practicable, many reforms which would otherwise remain unmeditated or unattempted. The most apparent of these are the abolition of the doctrine of notice, and a shorter period for carrying back a title than the monotonous sixty years now universally exacted.

The object of all legislation on this subject ought to be to render the transfer of land as cheap, as simple, and as secure as possible. This appears to us to be all that is required for the interests of the community. The community, however, is merely the aggregate of individuals ; and the paramount object of every individual proprietor since the time of the Conquest has been to alien or charge his land secretly, without either proceeding to perform any ceremonies on the land itself, or depositing

or registering any memorial whereby the terms of the disposition, or even its very existence, could be ascertained. So jealous are men of doing what they please with their own; so jealous also, it may be, of any knowledge or suspicion moving abroad as to their real position in the world; the rich, to avoid solicitations; the needy, to avoid contempt. This object, secrecy, has at all times been pursued by proprietors in preference to simplicity and security, and under the avowed necessity for increased expense. The constant efforts of the legislature, on the other hand, were for many centuries directed towards the publicity of all transactions affecting land. A history of that struggle, and of the similar struggle for the power of devising lands, and the holding land in mortmain, would be a history, if not of the whole real property law, at least of so much of the groundwork of that law as would leave little or nothing untold, except manifest explanations, deductions or corollaries.¹

The old Saxon custom was to transact all conveyances at the County Court or Shiremute, and enter a memorial of them in the chartulary or ledger book of some adjacent church or monastery;² and when this fell into disuse, the ancient feudal method of conveyance, by giving corporal seisin of the lands, answered in some measure the same purpose, though insufficiently, for there was merely the notoriety of giving possession, without the more accurate memorial, as in the Saxon times. But the many inconveniences which, while the lands remained subject to the incidents of feudal tenure, accompanied this open mode of investment—the liability to forfeiture, the incapacity to devise, the inconvenience and delay of a journey to the land itself—instead of leading men to abolish the system of tenure, upon which mainly these inconveniences were chargeable, led them to the contrivance of uses; by means of which a beneficial fee simple, not liable to forfeiture or other feudal exactions, and

¹ The legislature at length changed sides on the subject of devises, and by the Statute of Wills, 34 Hen. 8, c. 5, authorized as to the legal estate what had long been, surreptitiously at first, but afterwards quite avowedly, the practice as regarded the use or equitable estate. It was at last considered (reversing the policy of the common law) that the power to devise lands was beneficial to the community. And see in Blackstone (2 Com. 268—273) a quaint rehearsal of the series of attack and defence between the legislature and the clergy on the subject of mortmain, in which however parliament got the better. It is well known that in the course of these struggles uses and common recoveries were invented or adopted, which more than any other contrivances or artifices have given the peculiar tone to English real law. The long terms of years, which so long were the curse of our conveyancing system, were also a contrivance of the monks and their legal advisers.

² 2 Bl. Comm. 342; and see ante, Vol. xi. N. S. 249, where a description of the ceremony is given, extracted from Hickes's Dissertation.

capable of being devised, could be secretly conveyed without going upon the land itself. Any single one of these incidents would have been highly esteemed; united, they offered so many attractions, as that nearly all the lands in the kingdom came at length to be conveyed by way of use.¹

It has been the singular destiny a statute, containing, as Bacon observes, "the wisest and fittest ordinances, and the most foreseeing and circumspect savings and provisoes of any statute of these times," exactly and immediately to defeat one of its own declared objects. The favourite principle of the common law, as already observed, was that the right of property in land, and every transfer of it, should be open and notorious; and the secrecy with which uses might be declared to bind the land is expressly mentioned in the preamble as one of the mischiefs intended to be thereby guarded against. Yet the effect of the statute was, that not only the beneficial interest in the land as previously, but also the whole legal estate might be entirely transferred by a secret transaction, without any formality of giving or taking possession, and without even the security of any lasting document. The blot was immediately hit by vendors, and as quickly parried by the legislature by the statute of enrolments, which enacted that no estate of *freehold* should pass by reason only of any bargain or sale thereof, unless such bargain and sale were enrolled within six months in some court of record at Westminster. Had this enactment been practically obeyed as was intended, it would, in fact, have established a General Register. But even Henry the Eighth's acts of parliament, usually so sharp and effectual (especially where they touched the prerogative), were unable to cope with the ingenuity of practitioners, who even in those days delighted to drive a coach and six through that which they dare not tear in pieces. Upon these two statutes of uses and enrolments was founded the conveyance by lease and release, which, first introduced by Mr. Serjeant Moore, has endured for upwards of three hundred years, and which is even now the measure of the force and effect of modern conveyances, which it is declared, 4 & 5 Vict. c. 21, shall be as effectual as a lease and release between the same parties.

After this evasion the legislature no longer attempted to run counter to the indomitable obstinacy with which the owners of land insisted on secrecy. Perhaps, indeed, the policy of the law underwent some change; for the kingdom was then about to enter a middle period of enlightenment, but submission, before entering on the long struggle under the Stuarts, one of the

¹ Preamble, 27 Hen. 8, c. 10; Bac. Reading on Uses, 313.

fairest prizes of which was the abolition of the feudal tenure and all its vexatious yet valueless incidents on the Restoration.

When this tenure was abolished, the right of testamentary disposition (which the common law denied) having long before been conceded, there no longer remained any objection to requiring that openness and notoriety which the common law desired in all transactions affecting lands, except that propensity to concealment already adverted to. The ceremonious livery of seisin peculiar to feuds was indeed now no longer applicable, since all feuds were swept away; but there still remained that other part of the old Saxon formula—a memorial of the transaction might be required to be registered. But during the long period of years during which secret declarations of uses had been in vogue, so many and so complicated interests, unknown to the common law, had sprung up and been taken into cognizance, chiefly connected with the doctrines of constructive notice and terms for years, that a register of conveyances was no longer the simple matter which it had been in the old Saxon times, when springing and shifting uses and trusts, equities of redemption, statutes and recognizances, were all unknown and undreamt of. Accordingly, we find that nothing came of the various schemes for a General Registry which were brought under the notice of the legislature during the interregnum from 1649 to 1659, though special committees were sitting to inquire into the subject during every year in that time, upon which were included most of the legal authorities of the day, with Sir Matthew Hale at their head. And afterwards, in 1670, when a Bill of Registers was brought before the House of Lords in consequence (by a singular identity of circumstances with those under which the present measure is brought forward) of the recommendation of such a bill as a remedial measure by the Select Committee of that House appointed to inquire “into the decay of rents and the falling off of trade,” the difficulties, theoretical or practical, were too great to be overcome. A committee was appointed to consider of a bill, with power to call in any of the judges to assist their deliberations; but no bill was ever brought forward, and the subject was allowed to drop: and so down to the present time, with the exception of local acts, which are admitted to be constructed on faulty principles and with imperfect provisions, and are liable also to be now eluded, now overpowered, by the application of the doctrine of notice, actual and constructive, we remain without any endeavour at a substitute for the advantages which, in a period we look down upon as rude, persons dealing with land enjoyed. It is the Smithfield case of the wisdom of our ancestors’ fallacy over again. We insist

upon a servile reproduction of what they did, although in circumstances completely the reverse of theirs. Our ancestors uniformly, and very sensibly, adopted the contrivance of secret uses, when lands (not in use) were incapable of devise, were liable to forfeiture and other feudal incidents. But why do we obstinately adhere to the same secrecy now? And further, as the advocates of the City nuisances appeal to the length of time during which the public has endured, and to the vested interests forsooth acquired by nuisance-mongers in the interim, so would those who obstruct the necessary re-establishment of a General Registry cling to all the adventitious difficulties arising from the artificial safeguards which the courts have, in the absence of a General Registry, been compelled, for the prevention of frauds, to throw around all dealings with land.

The principal of these difficulties is that caused by the doctrine of notice, already referred to. Without this doctrine, and without a Registry of deeds, there would positively be no security at all against the most manifest fraud; and yet almost the whole of the expense to which conveyances too frequently run may be clearly traced to this doctrine of notice. To it, for instance, to guard against the possible existence of a concealed deed, may be ascribed the space of time through which our titles must be traced—the minute and extravagantly expensive evidence of every fact recited or alluded to in this unwieldy train—attested copies, and so on—and also the lumber of attendant terms, now happily exterminated. It was necessary to extend the consequences of fraud to cases of constructive notice as well as actual notice, otherwise a door, impossible to be effectually barred, would have been opened to multiplied frauds, collusion, wilful ignorance. This was soon perceived; but it was not so easy to draw the limit, and define what should be deemed constructive notice, or rather what degree of knowledge or opportunity should be deemed to fall short of constructive notice. In the laudable anxiety to defeat fraud (and fraud generally of the most artful description), the courts constantly widened the boundaries; and at length, in the language of the Commissioners, constructive notice has come to include notice of every fact which the judge thinks the party himself, or his attorney, or attorney's town agent, or his attorney's clerk, or attorney's town agent's clerk, knew, or might have known, or ought to have known. Now as facts might be in themselves unimportant which it was extremely difficult to prove to be so, it came to be one of the objects of conveyancers to keep many transactions and all hints concerning them quite separate and clear from the main title, in order that the deeds containing

such arrangements might be suppressed or kept back at pleasure. And deeds might frequently be thus suppressed in perfect innocence, but in many instances they were fraudulently suppressed when their production was of the first necessity. In all transactions then the suppression of title deeds is treated as a risk to be apprehended, and therefore to be guarded against; and as it is impossible to guard against it by the simplest means, in the absence of a General Registry, purchasers are compelled to protect themselves by the most cumbrous expedients,—by lengthy abstracts, by long searches, by covenants for production of deeds, attested copies, and, until lately, by the assignment of any attendant terms. And the only reason still existing for this preference of the cumbrous before the simple is the secrecy of the conveyance; all the other reasons which existed when uses and attendant terms were first invented have long since ceased. We mean the only reason in principle; there is another and a far more important reason which we shall speak of presently, viz. the difficulty of inventing a system of General Registry which will work. If the practical application would only introduce other conveyancing securities as tedious, as expensive, and not more trustworthy, than those now in vogue, the change (since all change is in itself an evil) is to be condemned. We are persuaded, however, that the uniform opinion of all the Commissioners both in 1830 and 1850, and also of the Committee in 1832, in favour of registration, has ample grounds to support it.

The most important preliminary consideration before entering on the discussion of the form, &c. of registration, is how far the rights of parties shall be affected by the priorities appearing on the register alone; and whether any and what effect is to be attributed to notice of unregistered deeds. The present Conveyancing and Registration Commissioners recommend “that the priority given by registration to any person claiming for valuable consideration under a subsequent assurance obtained without fraud, should not be taken away in consequence of such person having been affected with notice at the time of the execution of such subsequent assurance” (1st Rep. 1850, p. 29); and they refer to the 2nd Report of the Real Property Commissioners, 1830 (p. 37, seq.), for the grounds of this recommendation, adopting the conclusion of the majority of those commissioners. And the bill now before the legislature provides against the consequences of notice only to the same extent, viz., only in cases where the first registered proprietor shall claim without fraud. “The priority given by the provisions herein-
contained to any person claiming for valuable considera-

tion under a registered assurance shall not, as respects any person so claiming *without fraud*, be taken away by any court of equity in consequence of such person having been affected with notice" (s. 37). And so in s. 36; and so also the Real Property Commissioners reported the opinion of the majority of their number to a similar effect: "where the subsequent deed has been obtained by fraud, and proof of this is altogether independent of notice, registration ought not to give that deed validity." And the Commissioners thought, "that when such proof exists, registration would not prevent equity from giving relief." It would be a hard law to establish; but we think the words "without fraud" would have been better omitted, and that not even fraud should be allowed to interfere with the priority appearing on the Register.

With all deference for the authorities above quoted, we cannot but suspect their conclusion of inconsistency. Either let private notice of an unregistered deed be sufficient, and, *quà* the parties affected with such notice, equivalent to actual registration; or let nothing invalidate the registration; not even fraud. For if we consider the purpose of registration, it is simply to give notice of a certain deed; and a General Registration Act merely provides that registration, according to the provisions of the act, shall operate as notice to all the world. Where full notice already exists, registration, it may be said, is useless, the object of the act and of registration being already answered. Thus no scheme is brought forward requiring registration, as part of the ceremonies necessary for the validity of a deed as against any of the parties executing it. Why not? Because they necessarily have as full notice of the deed as they could possibly have by its registration. The same reason would seem to require the same results in all cases; and wherever full notice of a deed is given by other means to every person, it would seem that, to be consistent, we should not require such a deed to be registered in order to be valid as against that person.

But if we refuse this effect to particular knowledge of a deed, and require it to be registered, notwithstanding any private notice of its purport, it is still more inconsistent to except from the advantage of such registration any case of fraud, and most inconsistent of all, to say that such fraud shall be nevertheless some other fraud than consists only in notice of the prior unregistered conveyance. For, as we have seen, persons having already full notice of a deed, are the only persons in regard to whom registration (which is merely a formal means of giving general notice to all the world) is, as it were, a supererogatory work. They are, therefore, the only persons who ought not to

be permitted to plead non-registration to set aside a deed, since registration would merely have given them notice, and notice they already had. Yet this provision (s. 37, *ut supra*,) which forbids fraudulent claimants to plead the non-registration of a previously executed deed, excepts from the whole body of fraudulent claimants, that particular class whose fraud consists in this, that they had already, without any registration, full notice of the non-registered deed. Now it strikes us that of all fraudulent claimants, this particular category ought to be most especially prevented from pleading its non-registration against the previous deed, since they already had full notice of it. But there is another reason which would induce us to lean against this description of fraudulents more than against any other, viz., that these alone commit a fraud both against the grantor and the prior grantee. If a subsequent (and fraudulent) grantee be not affected by any notice of a previous and valid grant, i.e., if the fraud consist only in undue pressure upon the grantor, or taking advantage of the connection between the grantor and the fraudulent grantee, drunkenness, misrepresentation, &c., that may be a very good ground for setting aside the deed as between the grantor and the subsequent (fraudulent) grantee; but as between the first and second grantee, it does not seem to afford so clearly room for the intervention of equity. Yet the clause in the proposed bill sets aside such a conveyance, or, at least, deprives the subsequent grantee of the benefit of the act. But where the fraud consists in this, that the subsequent grantee, by collusion or otherwise with the grantor, and with full notice of the previous deed, takes a conveyance in fraud of the first grantee and registers it under the act; there it is declared that the subsequent (fraudulent) grantee shall be entitled to plead the non-registration of the previous *bonâ fide* deed. Yet in this case the fraud is perpetrated directly against the person seeking relief, i.e., against the first grantee. Indeed it is difficult to conceive any case of fraud clearly calling for the interference of equity between a previous and a subsequent grantee in favour of the former, which does not in a great measure, or wholly, proceed upon notice had by the subsequent grantee of the previous conveyance. And it is certain that no more disgraceful frauds or more totally unworthy of all protection have ever been perpetrated than those in connection with this very subject, where the notice may have been obtained while filling offices of trust and confidence, undertaken solely with the view of obtaining such a knowledge of circumstances as to enable the trustee or solicitor to effect the fraud.

There appears to us this further inconsistency in the provision

now under consideration, viz. that whereas it seems, from what has just been stated, that there can be no case of fraud between subsequent and prior grantees calling for the application of these principles which does not proceed upon notice; so, as between subsequent and prior grantees, the circumstance of notice alone does not call for the intervention of equity unless it also involve fraud. Notice *per se* is totally uninteresting to a court of equity until a deceitful advantage is attempted to be taken; so that, as far as regards the application of these principles, each of the expressions, "notice" and "fraud," seems by itself alone always to indicate both circumstances, (viz.) a knowledge of the previous transaction, and a deceit attempted or intended in relation to it. Any attempt therefore to separate the one ground of relief from the other, as if they constituted two distinct heads, seems to be faulty alike in the reason of things and in logical truth; since the distinction is surely only verbal, as between two sets of grantees. We admit, that if "full" notice of anon registered deed be taken to be a bar to a registered claimant, then "constructive" notice must also be admitted, otherwise endless uncertainty and collusion would quickly follow; and if "constructive notice" be permitted to stand in place of registration, a system of general registry would indeed be "a mockery, a delusion and a snare." It is therefore, we fully agree, of the first importance to make registration absolutely requisite, notwithstanding any private notice, however full, except perhaps as against the grantor himself. But we think that it follows as part of this result that no fraud, even in a subsequent grantee, should be allowed to supply the defect of non-registration by a previous grantee. Let the fraud be punished in any manner which may be thought proper, but not so as to weaken the operation of the whole system of general registry.

With this exception we think the effect proposed to be attributed to the registration of any assurance extremely judicious. It is not to be imperative to register any assurance; but the act authorizes certain assurances to be registered: and enacts, in effect, that any assurance authorized to be registered shall only rank as from the time of registration. A measure which, especially in connexion with the contrivances of caveats and inhibitions, to be described presently, seems to answer all useful objects and to avoid all solid objections.

But it is when we leave the consideration of what ought to be the force and effect of registration, and come to consider what are we to register, and where, and how, and especially how are we to class the registered documents so as to render them facile of access and reference, as they must be if a man's right to his

estate is to depend on his certainly discovering every document relating to it, that the amazing difficulty is seen of framing a system which shall be anything but an additional weight and incumbrance to conveyancing. Not to enter at large into all these questions, we will state that the present bill proposes, with the unanimous consent of all the Commissioners (both of the old Real Property Commissioners and the present), that not deeds only, and formal conveyances between parties, but all wills and letters of administration, petitions for adjudication of bankruptcy, &c., vesting orders in insolvency, memorandums of liens for nonpayment of purchase money, and of equitable mortgages, decrees in Chancery, &c., and in general all acts or documents affecting lands may be registered. One general central office in London is proposed to be established for the whole kingdom, not several local offices; and in general the originals themselves must be deposited in the register; in the case of decrees, &c., already of record, a memorial is to be sufficient. On all these points the commissioners are unanimous. But as to the mode by which any documents deposited or registered are to be discovered among the multitude of registered deeds, a very considerable difference of opinion has from time to time existed among the commissioners and amongst the various learned and experienced counsel and solicitors, whose opinions and evidence they have taken, and which are printed in the voluminous Appendices to the several Reports already mentioned. In fact, the form of Index to be adopted is that which will most materially affect the whole system; it may almost be said that the Index is the Register.

There are three obvious modes of indexing: one according to the alphabetical order of the names of grantors; a second according to the alphabetical order of the names of the lands or districts; a third, which is generally known by the name of a map-index. The objections to the first, which is the form of index now in use in Middlesex and the West Riding of Yorkshire, are, that the labour of searching for names, especially when they are common names, is very great, and therefore very expensive, and from its irksomeness, very liable to error: and requires to be constantly repeated and undertaken anew for the name of every person to whom a title is traced, on every occasion of the same lands coming over and over again into the market. The error, also, of misspelling a name can hardly be guarded against or compensated; and the expense of a continued search *de die in diem*, until the completion of a sale,¹ has been practically

¹ See Mr. Wimburn's evidence, App. 52nd Report of Real Property Commissioners, 1830.

found to render the examination, or rather proof of a title, little or not at all less expensive in a registered than in a non-registered county; while the risks common to both counties are not effectually guarded by the register, and new risks are necessarily imported with it.

The second plan of indexing, namely, according to the alphabetical names of places, is obvious to the same objections as the plan just noticed, and to many more. There is less variety of names; less facility of distinguishing places of the same name. This plan has accordingly been disused in the Middlesex and West Riding registries, where it was formerly adopted, though it is still retained, as well as the first-named plan, in Scotland, where however the indices are acknowledged to be found in very many instances to be practically cumbrous and unsatisfactory.¹ Other, and very great, difficulties arise in towns, where the index, upon turning up the name of a street, shows an array of 100 or 200 figures referring to as many entries in the printed abridgment, all of which must be examined in order to ascertain which of the entries is applicable to the house which is the subject of search; and again, where a large district is converted to building purposes, and covered with buildings, this leads to minute subdivisions, sometimes to be traced only with great difficulty.

These two plans of indexing being dismissed on these and other grounds, stated with great force by the Real Property Commissioners in their Second Report, already so frequently referred to,² we come to the plan of the map-index; where every separate portion of land is referred to its place on a general local map. But this plan the Real Property Commissioners likewise deemed inexpedient, notwithstanding the many manifest advantages which they admitted would flow from it.

"This plan," they say (p. 27), "has undergone particular consideration, in consequence of the collateral benefit to be derived from it, by affording evidence of the identity of the lands; but we have come to the conclusion that the preliminary expenses of framing a general map or description,—the difficulty of tracing land after complicated subdivisions or variations of boundary,—the difficulty of applying a description by boundaries to certain descriptions of property, together with the alteration which would be required in the modes of describing estates in deeds, and in the practice of conveyancing, render it inexpedient to attempt the establishment of a Register in this country founded on such a basis."

The Commissioners accordingly, having rejected all these plans, brought forward a plan of their own, or rather of Mr. Duval's,

¹ See App. No. 4 to 1st Report of Conveyancing and Registration Commission, 1850, p. 169.

² Page 24 et seq.

now known by the name of Mr. Duval's Plan: which was in fact a device to make the Register index itself. All deeds and transactions affecting one estate were to be registered under one head; each head was to have a separate number, or other distinctive symbol; and that symbol was to be endorsed upon every deed or memorial at the time of registration. Thus by producing any deed, with the symbol thereon, at the Register Office, or the symbol alone, all the deeds and documents relating to the lands affected by it might be seen at once. When lands held in one hand became divided into two channels, the offshoot might be registered under a new head, with a new symbol, referring to the first title from whence this new one was derived. And so when lands held by different titles became collected into one hand, it was to be sufficient to register the deeds affecting all the lands under one head, to which reference was to be made in each of the other titles.

Such was the principle of Mr. Duval's famous plan. It embraced also various ingenious devices of caveats and inhibitions, a directory of symbols, and several indexes under different subjects, for the greater facility of reference to all descriptions of transactions; but for the moment we shall omit these.

The bill founded on this plan, which was unanimously recommended by the Real Property Commissioners, met, as has been related, with a very solemn reception at the hands of the legislature, but was rejected without even being read a second time in the House of Commons.¹ It was, however, re-considered with great care by the members of the existing Conveyancing and Registration Commission, and condemned by a majority of five against two; the five uniting in recommending the system of map indexing, and pointing out, with much acuteness and clearness, the difficulties attending Mr. Duval's plan, and the mode in which those difficulties would be obviated by their own.² The two dissentient commissioners, however, while they admit the advantage, not to say necessity, of establishing some system of registration, and admit also the utility, for many purposes, of maps, adhere to Mr. Duval's plan, with certain modifications; and the present bill seems in a great measure to accord with their views, as far as these are stated, or rather hinted at, in the supplemental Report made by these two gentlemen.

The present bill, as originally introduced, seems to have attempted to unite the advantages of a map index with those of

¹ See ante, p. 2, and n. (3).

² Lords Langdale and Beaumont, Bellenden Ker, Coulson and Frere, against Messrs. Humphry and Broderip.

³ Pages 11—22.

Mr. Duval's plan. In the twenty years that have elapsed since the failure of the bills founded on the Second Report of the Real Property Commissioners an amazing alteration has taken place, not only in the rapidity and facility of postal communications,—the old mail-coaches would have been totally inadequate to the conveyance of any considerable quantity of documents,—but also in the topographical resources at the command (if necessary) of any registry office which may be established. And the bill, in its first shape, accordingly directed that maps should be provided for every one of the districts into which it was proposed that the whole kingdom should be gradually divided, and that such maps might be founded either on the Tithe Commutation maps or on the Ordnance Survey, or on such other local maps as should be thought fit; and that these maps should, when finally determined upon, form what were called the land index of the district. A register of titles was also to be kept, with an index, according to the principle of Mr. Duval's plan; and upon every entry in each index reference was to be made to the corresponding entry in the other. But however valuable the Tithe Commutation and Ordnance Survey maps may be, they do not possess sufficient accuracy, nor are they in general upon a sufficiently large scale, to answer the purpose here pointed out. However great the accuracy of private surveys, they do not possess the authority of a public survey by totally indifferent engineers; and thus the map index still stood exposed to all the difficulties, expense, labour, delay and inconvenience which had led to its rejection in 1830. The land index, therefore, which was so prominent a feature of the original scheme, subsided, while the bill was before the Lords Committee, into a mere permissive enactment, providing that maps and a land index might, if deemed expedient, be provided for any district; being transposed from section No. 7, at the very head of the bill, to No. 68 in the bill as altered. But as finally brought down from the Lords, every provision concerning maps and land index is omitted.¹

One important feature in the proposed bill will probably meet with considerable dissent. No copies of any documents will be admitted to registration, unless where the originals are already deposited in some authorized record office, or in cases of loss or destruction. Where more than one original exists, as if a deed or will be executed in duplicate, one original only is required. With these exceptions, it is only by a deposit of the

¹ The clause was finally struck out on the third reading, on the decided objection of Lord Lyndhurst, and was readily acceded to by Lords Campbell and Brougham, who were both present.

original documents themselves that the security of the act is to be obtained. We confess that we viewed this provision, even in the form in which it existed in the abandoned propositions of 1830-32, with considerable disapprobation. By those measures it was to be optional with the purchaser to register either the original document or a copy. But it was evident that this would in a great number of cases operate as a compulsory enactment for the registration of the original, to the manifest violation of the universal national impulse by which, as Sir Edward Sugden remarks, "every Englishman likes to have his own 'sheepskins' in a box in his own 'castle.'" No man's right, it was argued, should be unnecessarily, much less wantonly, broken in upon. Therefore no man's title deeds should be taken from him; and as to the option which was offered of depositing copies, the rich ought not to be put to the expense, and the poor could not afford to avail themselves of the alternative. Moreover, a man whose title deeds were thus deposited could not indorse a subsequent deed upon them, by which, in thousands of instances, great expense was avoided; nor would he be able to raise money by a deposit of the deeds themselves; and the want of such a power might in a mercantile panic be most fatal.¹ These arguments were certainly of great weight; but by the system of "caveats" and inhibitions," especially as these are proposed to be managed under the present measure, and by the abolition of the doctrine of notice, as hitherto applied by courts of equity, these same arguments lose all their force, or are even turned the other way, or are counterbalanced by immediate and far greater advantages.

The invidious distinction which the old measure practically drew between rich purchasers and poor is, at any rate, not to be found in the present bill; the originals must in every instance (with the above-mentioned exceptions, which are of a nature common to rich and poor) be deposited. There being no longer (after registration has commenced) any fear of notice, or of prior secret charges, the power of raising money on equitable mortgage, so far from being obstructed or extinguished, as has been objected, will be enormously increased: by registering a memorandum of equitable mortgage, or entering a caveat, the equitable mortgagee may instantly secure to himself the absolute security of a legal mortgagee without notice; a security which will last long enough for the mortgagee to clothe himself with the legal estate, if he thinks fit; or the caveat may from time to time be renewed. The effect of the caveat is to secure to the person filing it, and to every person claiming under him,

¹ Sug. V. and P. 978, seq.

the same priority as if he had then registered a conveyance of the legal estate.

The system of "inhibitions" is of a somewhat kindred nature, but will probably be even more valuable; tending as it does extremely to simplify titles. An inhibition may be filed by any person named in any registered assurance, or any person making affidavit that he has an interest in the lands affected by a registered assurance, although he be not named in it. The effect of this "inhibition" is to prevent the registrar from enrolling any assurance affecting the lands in question, without giving notice to the person who has filed it. Any person may require the Registrar to cancel such inhibition, of which requisition immediate notice is to be given to the party filing it; and the inhibition is to be cancelled, unless an injunction be obtained within a fortnight from some court of equity, restraining the Registrar from doing so. The injunction may be obtained *ex parte*, on motion or petition, in a summary way.

Now, from this short account it will be perceived that there is good ground to hope that titles will for the future, in the majority of instances, be burthened by no trusts or settlements whatsoever—that there will appear on the register a short summary conveyance showing an unincumbered title in fee simple; with possibly one or more inhibitions. Unless these are cancelled before any sale takes place, the purchaser will be affected by all the uses or trusts of any unregistered settlement. But the inhibitions being cancelled (as they may be in a fortnight if no steps be taken to prevent it by the persons who have filed them) a free unincumbered title may be immediately conveyed. The practice will probably be therefore upon every settlement of lands by deed or will, to effect this by two instruments: the one instrument, which will be duly registered, being a simple conveyance to trustees in fee, referring to the second instrument, not registered, in which all the trusts will be set out. Such a reference in a registered deed will not affect a purchaser with notice of the trusts of a non-registered instrument.¹ Any or all of the *cestui que trusts* may file inhibitions however; and any person purchasing while any such inhibition remains uncanceled, will be bound by all the provisions of the non-registered instrument.² Thus the due execution of the trusts will be left to the fidelity of the selected trustees, and may be enforced as against them with the same facility as at present; indeed, not the slightest change will be effected as between trustees and *cestui que trusts*, properly so called; the latter will still

¹ Sect. 38 of the Bill.

² Sect. 43.

possess all the rights and remedies which it was ever intended they should possess; but the doctrines of constructive trusts, so often pushed to a monstrous length, alike to the injury of purchasers and vendors, will henceforth find no place. And the objection as to the inconvenience of being deprived of the power of endorsing new deeds upon old deeds will thus lose all its force; since, where the new deed affects the ostensible ownership, it is quite proper that it should be deposited; and if it merely refers to the non-registered deed, of course the power of endorsing it is not in the least interfered with. If, however, any settlor be desirous of fixing the trusts indelibly upon the land, he is to be at liberty to register the settlement; when, after all, the title will not be more encumbered than it is of necessity under the present system in a great majority of instances; and the security of those claiming under the registered settlement will be much increased. In fact, this security appears to be placed by the act on as high a footing as human foresight can reach; and as a further guarantee against all possible malversations on the part of the trustees, any person claiming under any assurance authorized to be registered may compel the registration of it at his own expense; he providing also at his own expense an office copy for the person who would otherwise have been entitled to retain possession of the original document.

As to the general objection above quoted, that no man's rights should be unnecessarily, far less wantonly, broken in upon: like all general objections, it depends for its force entirely upon the particular cases to which it is applicable. The advocates of a general registration are ready to take the proposition into their own mouths, and fully to acquiesce in its truth; but they deny that the present measure does unnecessarily or wantonly break in upon any man's rights. And in the preceding instances, which are those upon which Sir Edward Sugden relies, we submit that (all our space permits) at least some ground has been shown for denying that any unnecessary infraction is proposed, or any alteration which in reality deserves so harsh a title as infraction; but rather that every alteration is calculated for the good of all. And after all, what are a man's "rights?" It is only from a regard to the welfare of the community at large, that the laws secure to any individual the possession or enjoyment of any object of property. No individual has a sacrosanct right or title in any property, or in the "sheepskins" relating to it: he holds them by permission of the community, and on such terms as the community thinks fit to impose; which vary extremely, be it observed, in different countries and in different parts of the same country. Even the maxim *cujus est solum*

ejus est usque ad cælum, does not prevent the inhabitant of Lincoln's Inn from enjoying his "castle" in the air; neither an unreal nor incorporeal hereditament. And in most parts of the continent, the right to the soil gives no right to the mines under it. The terms therefore imposed by the community are in fact the measure of a man's "rights;" and nothing which is in accordance with those terms can be inconsistent with his "rights." If, therefore, the community deem it advantageous to require a deposit of a man's title deeds, it is no infraction of his rights to insist upon such a deposit.

The remaining clauses of the proposed measure are taken up principally with directions for regulating the practice of the office. There is one important set of provisions, however, relating to the duties and responsibilities of solicitors on the one hand, and the registrar on the other, under this act. The duty of a solicitor, as far as regards the searches to be made under the act, are to be deemed fulfilled upon his delivering at the office a requisition for a search, and obtaining a certificate of the result of such search: no solicitor, of course, is to be responsible for relying on the accuracy of such certificate. And as to the errors which must unavoidably be committed in the registrar's office, the registrar is not to be personally liable, but the damages, if any, which may be recovered in consequence of any such error, are to be defrayed out of the Consolidated Fund. The only other clauses of general importance are those which except from the operation of the act, 1. All copyhold lands; 2. Leases at a rack rent, where possession goes along with them; 3. Lands in the Bedford Level. But the provision abrogating the doctrine of tacking mortgages is nevertheless to be general; so that the hardships and malpractices springing from that ill-conceived equity will cease.¹

We may observe, that of the five evils requiring remedies, as proposed by Sir E. Sugden, in the passage in the note, three have been already modified, to some extent at least, in previous parliaments; and the present measure deals with the other two, (*viz.*) notice and tacking, somewhat more summarily than Sir Edward perhaps intended to suggest in the passage referred to, but nevertheless in the same sense; where Sir Edward merely recommends restraint and modification, Lord Campbell abrogates at once. And this is following, in its true spirit, Lord Coke's envoi, in the epilogue to his fourth Institute, "Blessed be the amending hand." For whereas it may be objected that his lordship's is here a destroying hand, it is to be observed that

¹ Sug. V. P. 986, 11th ed.

Lord Coke spoke of the whole growth of our jurisprudence. It is no amendment of the tree if mischievous excrescences be pared and trimmed, so as to be tolerable still. The only true amendment is the excision of the whole mischief; not such a remodelling of it as leaves it more thriving, more likely to endure, than before.

It is much to be regretted, however, that the good which we see about to arise from this measure, will be necessarily long, very long, of bearing practical results. The full advantages must of course be deferred until the first registered conveyances acquire the dignity of full age. Some restraint at the least, however, might be immediately placed on the doctrines of tacking and notice; yet the very judicious enactments of the measure now before us, in respect to these doctrines, are not to take effect in any district until registration shall have commenced. And this may not be for a long time, certainly years will elapse before all England be included. The interval, indeed, will probably now be much shorter than could have been the case under the original measure, when maps were to have been formed and the land index arranged before registration could commence. But even now it does not seem to be contemplated to bring the present register counties within this act until 1857,¹ and during all that time, in those districts at any rate, tacking and notice will continue on the present footing.

The very great extent of the subject, and the possibility that the measure may in the end even yet fail of being carried through the Lower House this session, has prevented us from anything but a review of the salient points of the present measure, and the subject of registration in general. We can only wish (and, we fear, wish in vain) that some measure could be introduced which could do for present titles, what this bill seems calculated to effect for titles thirty or forty years hence, bearing always in mind that a register office is only in one case out of fifty² required for the protection of a purchaser against a fraudulent vendor, but that it would almost to a certainty, in the remaining forty-nine cases, be of assistance to a *bonâ fide* vendor to satisfy a cavilling, over-scrupulous purchaser.

¹ Sects. 76, 78, of the bill.

² The proportion assumed by Sir E. Sugden of titles fraudulently bolstered up by the suppression of concealed deeds.

ART. II.—THE EQUITABLE DOCTRINE OF
APPROXIMATION.

ALTHOUGH the equitable doctrine of approximation, or, as it is generally called, *cy près*, is in its application regulated by abstract principles of a more than usually refined and subtle character, still these, when clearly apprehended and separated from the details of facts and circumstances peculiar to each case, by which they are not unfrequently concealed or at least obscured in the Reports, may be so generalized and arranged as to be distinctly brought before the mind within the compass of a comparatively few pages; and accordingly our present object is to gather within the scope of a single article the various cardinal points in connection with this subject which have been decided by the judges of the Court of Chancery, to whose jurisdiction the determination of cases of this nature has been specially and very properly assigned.

Without entering into any historical detail of the inconveniences and ecclesiastical frauds, the removal and the frustration of which the legislature contemplated in the enactment of the Statutes of Mortmain,¹ it may be sufficient at the outset to state, that at an early period courts of equity, with a view to preventing the utter defeat of a devisor's particular intention, were anxious to discover a method by which it might consistently with legal principle be carried into effect. There was thus gradually introduced such a modification of the strictness of the common law, with respect to conditions precedent, as is at once rational and promotive of the real intention of the testator; it being held, that, where a literal compliance with a condition imposed by a devisor became impossible, in consequence of unavoidable circumstances, and without any default of the party himself, such condition should be considered as satisfied, provided it was observed as nearly as it practically might be. This relaxation of the strictness of legal principle seems to have been derived from the civil law, and rests on a presumption that a devisor could not intend to require the observance of a condition which very possibly could not in the nature of things be fulfilled; but simply such a substantial compliance of his directions as amounted to a fair and reason-

¹ The statute generally referred to as the Statute of Mortmain is the 9 Geo. 2, c. 36; but vide the remarks of Sir R. P. Arden, M. R., in the case of *Corbyn v. French*, 4 Ves. 427, where he disputes the propriety of giving to that act such a designation.

able execution of them.¹ Thus originated the doctrine of approximation; which, when once adopted, was in not a few decisions allowed to operate to a very considerable extent.²

The illustration of the principle in its primary and simplest form is afforded by those instances of devises in which the testator has expressed himself in terms which were considered by the court to convey a clear indication of his intention that the devisee and his issue should take the lands, as well as an intimation of the mode in which such issue should take them; while, at the same time, the language of the testator has been such as that, when construed literally, it disclosed limitations contrary to law. Courts of equity, in construing the language of such devises, decided that the primary object which the testator had in view was, that the devisee should take the land, and that the mode in which it should be taken was only a secondary object in the mind of the devisor; in other words, that the former point was his general and the latter his particular intention. The rule, therefore, being that the intention of the devisor should be effectuated as far as it possibly might be, it was found necessary to sacrifice the particular objects which he might appear to have contemplated, in order that his general purpose might be fully realized. Thus, by a construction so enlarged as to embrace all the parties intended to be benefited within the operation of the devise, the mode in which they should take might materially vary from what appeared to have been the wishes and design of the testator; and, in fact, so far had this canon of interpretation been carried, and so much nice discrimination was it necessary to exercise in the application of it, that the judges in equity anticipated evil results from its further progress; the doctrine of approximation, even in its incipient state, when viewed strictly as operating upon real property, was denounced as having been carried to the utmost verge of the law, and as having, under a pretext of reconciling the general with the particular intention of a testator, proved the means of totally annihilating both.³ The principle, how-

¹ Vide 1 Story's Comm. on Eq. Jurispr 235, and the authorities there quoted.

² Fearne, Cont. Rem. by Butler and Smith, 4th ed. 204, and 205, n.; compare 2 Ves. jun. 380; 3 Ves. 141, 220, 633. Lord Loughborough, in the case of Att.-Gen. v. Andrews, 3 Ves. 633, remarked, that some of the cases cited had gone so far as to exclude the doctrine of *cy prs* in questions relating to charities from the consideration of the court,—a notion which he refused to sanction. So that it would appear that counsel at least had attempted to carry the doctrine from one extreme to another.

³ Vide 1 East, R. 451; 7 Ves. 390; in the latter of these cases, the language of Lord Eldon, as to the necessity of encouraging a more cautious application of the doctrine, is very strong.

It may perhaps be unnecessary to remind even the most inexperienced reader

ever, even after the courts had become more guarded in the application of it, was, when extended to the regulation of charitable bequests, allowed so freely to expand itself that it at last grew into a branch of equitable jurisprudence of considerable extent and importance. Even pure points of jurisdiction have arisen in connection with this subject. Before the Court of Chancery could in such cases assume jurisdiction, there must have been an appointment of trustees, or, at all events, evidence that such appointment had been contemplated; for if the gift were to charity generally and indefinitely, without trustees nominated or objects specified, the king, as *parens patriæ*, assumed the office of constitutional trustee.¹ A question, therefore, immediately arose as to whether the jurisdiction of the court was to extend over every case in which trustees had been originally interposed, without reference to any subsequent events, or whether the jurisdiction could by circumstances be so curtailed as to transfer the right of patronage and regulation affecting the charity from the Court of Chancery to the crown. Under either jurisdiction, however, the principles observed in the administration of the charity are identical. The crown, so far from appointing arbitrarily by its sign-manual, considers its prerogative to be circumscribed by the rules which have been established in courts of equity; and accordingly, to ascertain the rules by which the advisers of the crown ought, in the

that the doctrine under consideration is not applicable to personal legacies (2 Ves. jun. 357); nor is it applicable to limitations in a deed (7 Ves. 390; compare Fearn, Cont. Rem. 208, n.) Even when the general principle respecting perpetuities is involved a distinction has been admitted to exist, inasmuch as the courts are extremely unwilling to arrive at the conclusion of a devise being utterly void; they would rather apply the doctrine of approximation, and so expound the will as to carry the intention of the testator into effect, so far as such interpretation may be consistent with the rules respecting perpetuities. Vide Cr. Dig. tit. 32, c. 26.

¹ The general principle most reconcileable with all the cases is, that where there is a general indefinite purpose, not fixing itself upon any objects, the disposition is in the king by sign-manual; but where the execution is to be by a trustee, with general or some objects pointed out, that the court will assume the administration of the trust (7 Ves. 86; compare 5 Russ. 112, 113). Lord Eldon, in alluding to the means by which the general intention was to be carried into effect, considered it a most difficult question. It being established that where money is given to charity generally and indefinitely, without trustees or objects selected, the king is the constitutional trustee, it is not easy to raise a solid distinction between an original gift absolutely indefinite and without qualification and a case in which, by matter *ex post facto*, the gift stands before the court, in consequence of that accident, as if it had been originally given indefinitely, without any means prescribed for carrying it into execution. "All I can say about 'it is,'" continued that eminent judge, "that I do not know what doctrine could be laid down that could not be met by some authority on this point, whether the proposition is that the crown is to dispose of it, or the master by a scheme."

discharge of such administrative duties, to be guided, it is only necessary to keep steadily in view the course of reasoning which a court of equity would in all probability have under similar circumstances pursued.¹

But supposing that there should be no preliminary bar to the interference of equity, arising, on the one hand, out of the nature of the case itself, or, on the other, inseparable from the constitution of the court, it by no means follows that there may not be other ingredients which render the application of the doctrine highly inexpedient, even although the consequence of disregarding it should be a total defeat of the charitable purpose contemplated.

The first class of cases, for the regulation of which the court has declined to interpose its authority, is composed of those in which, from the very special and limited purposes which the donor had in view, an intention has been indicated of confining the gift to such purposes. All idea of applying the property to the attainment of any ends except those specified having thus been precluded, the charitable object has been not unfrequently utterly defeated, either in consequence of some vice inherent in the very nature of the purposes intended, or by the direct interposition of Mortmain Acts. In cases of the former description, for instance, it was held by Lord Kenyon,² that, if no obstacle intervened to prevent the testator's object being effected, his intention must be strictly pursued, without any controlling or qualifying interference on the part of a court of equity; and this decision was subsequently considered as being so conclusive on the point that Lord Alvanley³ treated the notion of applying a fund, which happened to be in question before him, under the circumstances of the case, to any other charitable purpose than the one distinctly marked out as being altogether incompatible with the spirit and language of that decree. All doubt upon the subject was finally removed by Lord Eldon:⁴ and in pursuance of the same principle, Lord Cottenham,⁵ when Master of the Rolls, dealing with the facts of a case in which there was clearly no gift, except on condition of that being done which could not possibly be effected, held, that the principle on which

¹ Such gifts as are affected by the law relating to superstitious uses constitute a totally distinct class of cases, which may probably be the subject of subsequent examination.

² *Att.-Gen. v. Bishop of Oxford*, 1 Bro. C. C. 444, n. "The intention," said Sir Lloyd Kenyon, "must be implicitly followed, or nothing could be done."

³ 4 Ves. 432; compare the language of Lord Alvanley, 2 Ves. jun. 388; vide 3 Bro. C. C. 379; 3 Ves. 646.

⁴ *Moggridge v. Thackwell*, 7 Ves. 81.

⁵ *Cherry v. Mott*, 1 Myl. & Cr. 131—134.

a court of equity executes a general purpose *cy près*, it being impossible to follow out the particular mode, could not under the circumstances be brought into operation.

As to the other class of cases, the authorities are even more uniform and the result is still more certain. If a bequest cannot be applied in acquiescence with the terms of the gift without drawing along with it an encroachment of the Statutes of Mortmain, the charitable object is unquestionably frustrated. Mr. Justice Buller¹ stated that the rule which might be drawn from all the cases is, that the court, in every case in which it has directed a sum to be applied to uses different from those for which it appeared to have been originally destined, has seen reasons for believing that the application prescribed by itself was strictly consistent with the purposes mentioned by the testator; and Lord Thurlow² sanctioned the doctrine thus laid down and refused to look about in the case before him for hints or trivial circumstances which might appear to warrant a departure from the general rule. The language of Mr. Justice Buller, in the case of the Attorney General v. Goulding, is, at all events, a striking illustration of the extreme caution with which the court proceeds to adjudicate on such questions. In short, the court will not administer a charity in a manner different from that which has been specified, unless there is reason for believing that, although it cannot be literally executed, another mode may be adopted by which it may be substantially carried into effect without infringing upon the rules of law.³ Wherever there is a definite object which cannot be attained, the court will not look for another object, but will allow the property to pass to the next of kin or to the heir-at-law. In the

¹ Att.-Gen. v. Goulding, 2 Bro. C. C. 428. Mr. Justice Buller admitted that "there had been subsequent cases which varied the rule." Upon this point, however, Mr. J. Buller and Sir R. P. Arden were at issue, the latter denying that the rule had been varied. Vide Corbyn v. French, 4 Ves. 418, 432; Att.-Gen. v. Whitechurch, 3 Ves. 141; Moggridge v. Thackwell, 7 Ves. 82; the last mentioned case having been, in the first instance, heard by Lord Thurlow (1 Ves. 464), and afterwards by Lord Eldon.

² Blandford v. Thackwell, 2 Ves. jun. 238.

³ Vide the language of Sir R. P. Arden, in the case of the Att.-Gen. v. Whitechurch, 3 Ves. 144, who, it would appear, at one time entertained doubts as to the soundness of the principle involved in the decision (2 Ves. jun. 388) of the Att.-Gen. v. Gould, although he subsequently concurred in it. Compare the language of Sir W. Grant in the case of Chapman v. Brown, 6 Ves. 410. It will be found, upon referring to the case of Att.-Gen. v. Earl of Winchelsea, 3 Bro. 378; S. C. 2 Cox, Rep. 304, that the following expression dropped from Sir R. P. Arden, "So in Att.-Gen. v. Gould, where Mr. Justice Buller seems to have gone to a great extent, and as far as the case could well warrant him."

case of the Attorney General v. The Bishop of Oxford,¹ the object which the testator had in view was the building of a church, or, in the language of Sir R. P. Arden, "the erecting a pillar of vanity;" beyond that he contemplated nothing, and nothing short of that could meet his intention and satisfy his wishes; and, accordingly, it was necessary that the object should be effected *in toto*, or the property should pass to the next of kin. The case of Chapman v. Brown² may be taken as a very simple illustration of this doctrine: the only question there being with regard to the validity of a bequest for particular purposes. The bequest, which was in the alternative to build or purchase, fell to the ground; and then a question arose upon a direction contained in the will, that, if any surplus remained after the purchase or erection of the chapel, it should be expended in the support of a faithful minister. It was contended by the next of kin that this was a bequest depending upon the former, which failing, this must also fail. Sir W. Grant, after alluding to the doubts which had been thrown by his predecessor over the case of the Attorney-General v. Gould, as an authority, and the subsequent change in his views, expressed himself to be clearly of opinion that the testatrix must have meant a minister of that chapel which, she conceived, might be purchased. It could not, without absurdity, be supposed that she intended to make no provision for the minister of her own chapel, while, on the other hand, her bounty was to be enjoyed by the minister of some other chapel built or to be built by a stranger. He fully assented to the doctrine laid down in the case of the Attorney-General v. Boulton and that of the Attorney-General v. Gould; and, consequently, he held that, as the chapel could have no existence,³ there could be no application of the fund *cy-près*.

Still further, the doctrine which we are now discussing cannot be permitted to operate merely because some imagined benefit is anticipated from giving latitude to the language of a written instrument or upon any bare suggestion of expediency. If the will points at any particular objects, the Court of Chancery will not direct an application of the funds to any other purposes. Nay, Lord Thurlow, resting upon the simple possibility of the specified objects of bounty coming into existence at some future period, refused to order a scheme which might have the effect

¹ 1 Bro. C. C. 444.

² 6 Ves. 404.

³ Ibid. 409. If the primary gift fails, the secondary gift being totally uncertain and fluctuating from time to time, the whole must fail. Vide Att.-Gen. v. Davles, 9 Ves. 546; Att.-Gen. v. Hinxman, 2 Jac. & Walk. 270.

of defeating the original intention;¹ and it has been authoritatively declared,² that it is beyond the competency of the court, so long as any means can be found of applying the particular fund exactly in accordance with the views of the founder, to alter the nature of the charity upon any general surmises as to public benefit; the creator of the charity, so long as he acted within the limits of law, having an indefeasible right, according to his own notions of expediency, to determine the form which he meant his bounty to take as well as the channel in which alone it was to flow.³ So strictly was this rule of construction adhered to through a long series of cases, that the extension even under favourable circumstances of the supposed usefulness of a school was considered as altogether out of the question.⁴ And although the records of proceedings in equity supply many cases in which, when the particular thing prescribed could no longer be possibly done, the court has sanctioned a variation from the strictness of the original directions, a variation at all times carried into effect only by as close an adherence as possible to the intention primarily expressed; still, if there be a likelihood that the purposes for which the founder bequeathed his property may be faithfully and fully attained, and still more if no circumstance has intervened to obstruct any attempt at effectuating his intention, a court of equity will pause before it assumes a power to vary the nature of the trust. Such circumspection was repeatedly vindicated and enforced by Lord Eldon, and on no occasion were his sentiments more unequivocally expressed than when, on what might have been considered a very reasonable proposal, that a school, which had from time immemorial ceased to be that which, upon a construction of the instruments establishing it, it was intended to be, viz., a grammar school for instruction in the classics, should be converted into a seminary for the teaching merely of the English

¹ Att.-Gen. v. Oglander, 3 Bro. C. C. 166. "Although where a charity is so given that there can be no objects of it, the court will order a different scheme to be laid before it, yet if the objects *may* exist, although they do not at present, it will not."

² By Lord Eldon, in the case of Att.-Gen. v. Whiteley, 11 Ves. 241.

³ Att.-Gen. v. Huntley, 2 Jac. & Walk. 383, where Lord Eldon remarked, "If the founder thought proper to establish a grammar school, and if afterwards, from different notions about education prevailing, it became of much less public benefit, that is not a ground upon which a judge can alter it. *He who created it had a right to determine its nature.*"

⁴ Att.-Gen. v. Dean and Canons of Christ Church, Jac. Rep. 474, before Sir T. Plumer, and the same case was subsequently brought under the consideration of Lord Eldon (2 Russ. Rep. 323, 324). It may be remarked that Lord Hardwicke (1 Vern. 415, 416) considered general disusage as evidence of consent to dispense with part of the constitution of a charity.

language, writing and arithmetic, he restrained the trustees from altering the original destination of the endowment. He had no authority to alter the foundation with a view to any superior benefit which might arise from an institution of a different character, however desirable a new mode of administration might be and supposing that it were within the scope of any preceding authorities to substitute the one for the other.¹ And, although at first sight, it may appear that a subsequent case² infringes upon the principle thus established, a closer examination of it cannot fail to show that, as might have been expected, there is perfect consistency in the line of argument pursued and the conclusions reached by Lord Eldon. The reference to the Master in that case with a view to the maturing of it for future decision, would not have been ordered if Lord Eldon had suspected any latent incompatibility in the scheme proposed with the charity as founded by the testator. The difficulties, indeed, in the way of deviating from the plan which happens to be laid down by a testator, may be regarded as insuperable. The court will adhere to the letter of the gift: the conditions with which it is clogged may be unnecessary or inconveniently severe; but equity, so long as they are strictly practicable, declines to relax the rigour of them:³ no paction between parties to set aside one class of objects and substitute another which may be more congenial to the tastes or less obnoxious to the prejudices of individuals can, with safety to the general interests of a community, be upheld, inasmuch as the judges of the Court of Chancery have more than once shown scruples of conscience about sanctioning the more than equivocal doctrine of "robbing Peter to pay Paul."⁴ It may readily be believed, from the jealous anxiety displayed by the court to ascertain the real intentions of a testator and fully as well as impartially to execute them when distinctly known, that if parties claiming the benefit of a trust for charitable purposes should adopt a system totally

¹ *Att.-Gen. v. Earl of Mansfield*, 2 Russ. 501: compare *Att.-Gen. v. Haberdashers' Company*, 3 Russ. 530, and *Att.-Gen. v. Dixie*, reported, in a note, 3 Russ. 534—537.

² *Att.-Gen. v. Dixie*, 3 Russ. 534, n. This case was subsequently before the court (2 Myl. & K. 342), but the order of Sir John Leach on that occasion does not touch the point in question; for, admitting that it involves principles adverse to those recognised in the case of the *Att.-Gen. v. Mansfield*, the latter overrules it, the date of the former case being the 23rd of December, 1825, whereas that of the *Att.-Gen. v. Mansfield* was determined on the 13th of November, 1827; vide 3 Russ. Rep. 534, n., and 2 Russ. 501.

³ *Att.-Gen. on behalf of Peter House College, Cambridge, v. The Margaret and Regius Professors in Cambridge*, 1 Vern. R. 54, decided by Lord King.

⁴ Vide the language of Lord Nottingham in the case of *Man v. Ballet*, 1 Vern. R. 43.

different from that which alone the original donor intended to protect or aid, while other parties interested in the charity adhere to the views which were primarily the objects of favour, equity will not consider itself entitled to step aside from its common course, under any pretext, to weigh the comparative merits of two or more sets of opinions. The original purpose, if attainable, cannot be sacrificed upon theory; the will of the donor is to the court, under such circumstances, the only standard of orthodoxy.¹ Nor will the court, if it should appear that there is an attempt to escape from the operation of a rule of law by introducing a proviso that, in the event of the trusts being held to be void or incapable of being carried into effect, then the trust funds shall be transferred to the executors or administrators of the grantor, consent to carry the gift into effect *cy près*.² Cases, however, and dicta upon this branch of the subject have not been uniform. The difficulties attending the administration of such substitutional gifts have not unfrequently perplexed the mind of the court, which has been anxious, on the one hand, to effectuate the intentions of the testator, and, on the other, to guard itself against giving countenance to a surreptitious evasion of any statutory enactment or principle of law.³

Partial deviations from the tenor of the gift being thus uniformly discouraged, it may easily be conceived that a total frustration of the objects contemplated by it, through a misapplication of the funds to purposes arbitrarily chosen without reference to the intentions of the testator, is absolutely disallowed. But cases of this description strictly involve questions as to breach of trust, although sometimes in the course of discussing them allusion may have been loosely and remotely made to the principle of approximation.

Charities, however, have always been so highly favoured in equity that the judges, rather than that the intention of a benevolent testator should fail, have been sedulous and astute to detect grounds upon which the charitable object might be

¹ *Att.-Gen. v. Pierson*, 3 Meriv. R. 418, 419.

² *De Themmines v. De Bonneval*, 5 Russ. R. 292. In this case the trusts were declared void as being in the nature of superstitious uses, and the fund was held not to be applicable to any other charitable purpose. The gift was indeed strictly conditional; and it is worthy of remark, that, although the special purpose, being contrary to the policy of the law, was defeated, the condition was allowed to prevail, on the ground that a condition is not unlawful which anticipates the possibility of a court deciding that the gift itself is unlawful. The party was therefore restored to his original rights.

³ Compare the case of *Att.-Gen. v. Tancred*, Ambl. R. 252, with the case of *Att.-Gen. v. Tyndall*, Ambl. R. 614; 2 Eden's R. 207. Lord Hardwicke took occasion to observe, that the case of *Att.-Gen. v. Lloyd*, 3 Atk. 552, is in its points extremely different from the cases with which it is usually classed.

sustained. However vague or indefinite the gift may be, provided it is in its nature strictly charitable, it will be carried into effect either by the court or by the crown, according as there happens to be or not to be an interposition of trustees. Indeed, the jurisdiction of courts of equity over charitable bequests is primarily derived from the authority vested in them to carry into execution the trusts of any will or other instrument.¹ We have already adverted to the language of Lord Eldon in the case of *Hayter v. Trego*,² and which, ever since the distinction was taken by him while disposing of the case of *Moggridge v. Thackwell*,³ has been adopted as marking the point at which the prerogative of the crown terminates, and the authority of the Court of Chancery begins to operate. Down to the time of Lord Eldon the law upon the point was in an unsettled state; and while communicating the results of his elaborate examination of all the cases bearing upon it, that most learned and acute judge admitted that there was difficulty in establishing a solid distinction between the case of an original gift absolutely indefinite and without qualification, and a case in which, by matter *ex post facto*, the gift is presented to the court, in consequence of such accident, precisely as if it had been in the first instance given indefinitely without any means prescribed for carrying it into execution. Subsequently to the expressed opinion of Lord Eldon, all doubt as to the jurisdiction of a court of equity disappeared. Accordingly, Sir John Leach, upon a question arising before him as to the application of a surplus yearly sum of money, after defraying the expenses of a scheme which had been confirmed by the court, conceived that he had full jurisdiction to extend the application of the income of the charity property beyond the mere literally expressed intention of the testator, provided the income was applied to objects connected with that intention.⁴ And although subsequently, in a case⁵ in which the particular purpose had failed, he declined to assume jurisdiction to devote the property in question to any other than the specified purpose, Lord Brougham upon appeal sustained the jurisdiction of the court,⁶

¹ 2 Myl. & K. 581.

² 5 Russ. R. 113.

³ 7 Ves. 86.

⁴ *Att.-Gen. v. Dixie*, 2 Myl. & K. 342.

⁵ *Att.-Gen. v. The Ironmongers' Company*, 2 Myl. & K. 576.

⁶ *Att.-Gen. v. The Ironmongers' Company*, 2 Myl. & K. 589. Sir John Leach, remarkable for his acuteness and habits of discrimination as well as his intimate acquaintance with the rules of equitable jurisdiction, and Lord Brougham, appear to have been at issue on this point; at all events, the latter (2 Myl. & K. 385), although it was stated at the Bar that Sir John Leach had substan-

and directed an application *cy près* of the income of the moiety of the fund in question.

The object of the court, while disposing of cases of this description, being that the intention of the testator, as it may be collected from the language which he employs, should be effectuated, the court will not even entertain the proposal to devote a fund to purposes distinct from those specified, until it has lost all hope of attaining the precise object which had been originally contemplated; and then, in the event of any deviation being necessary or beneficial, the operation of the court or of the Master must be strictly circumscribed within the limits which the individual bestowing the gift may fairly be supposed to have marked out. Even his known partialities will, when the point is otherwise doubtful, be sufficient to turn the scale.¹ Although the court considers itself, under certain circumstances, perfectly competent to vary the uses prescribed, it declines to interpose its authority unless there appear to be very substantial reasons for diverting the application of the fund from the original objects of bounty. And accordingly, as we have already hinted, no vague or partial notions of utility, no fanciful adaptation to any new or favourite system can be allowed to arrest or even to mingle with the stream of charity so long as it flows on towards its defined and destined point. The character of charity being once impressed on the fund, and the intention of the donor having been ascertained, there seems to be no violence of construction in the inference that, if he could have foreseen a failure of the particular object, he would have appropriated the amount to another object analogous in its nature to that which, it may happen, cannot be attained. An approximation to the ascertained intentions of the author of the gift is the very foundation of the doctrine which we are attempting to illustrate.² Such cases must, no doubt, have originally proceeded

tially sustained the jurisdiction, dealt with the case before him on the supposition that there existed an important difference of opinion between them; for while upholding the jurisdiction, he, on referring to the language of his Honour, remarked that it would be hard to conceive a more complete denial of the court's jurisdiction than was implied in the course recommended by Sir John Leach.

¹ Att.-Gen. v. Hudson, 1 P. Wms. 675.

² It is superfluous to refer to any one case in confirmation of this fundamental principle; all the cases have been argued and decided in accordance with it. We are aware that its soundness has been questioned by very high legal authority (vide 2 Story's Tr. 394, n.) The theory of the whole doctrine is built upon the fact of a *general* charitable intention; but that eminent author objects to any court presuming an intention to give to charity *generally*, when he has expressed himself only as to a particular object. "How courts of equity could arrive at any such conclusion it is not easy to perceive, unless, indeed, where the nature of the gift necessarily led to the conclusion, that the object specified was a

upon notions adopted from the Roman and civil law,¹ the principles of which were all favourable to the growth and permanency of charitable institutions; and the latitude of authority gradually assumed by the Court of Chancery has been only co-extensive with the varying and sometimes conflicting interests which it was its duty, if possible, to reconcile and protect. Accordingly, by the application of its general doctrine of trusts, in combination with the principles which regulate its decisions in matters arising out of testamentary dispositions, to this special class of cases, the chancellors, not forgetting that equality is equity,² have successively conferred important benefits on society by unraveling the intricacies, moulding the schemes, and checking the mal-administration of charitable endowments.

It may happen that the provisions of a will cannot be obeyed: as soon, therefore, as it has been ascertained by the court itself, or by the report of a master in chancery, that the object contemplated by the testator cannot be attained, the doctrine of approximation will be permitted to come into operation; and although the rule has always been considered as applicable to the mode and not to the substance of a bequest, the court, regarding charity as the legatee,³ will substitute a practicable and legal for an impracticable and illegal mode.⁴ A testatrix having in her will alluded to two hospitals in Canterbury, while, at the same time, she bequeathed a certain sum to *all and every the hospitals*, the gift, although not allowed to extend to an hospital about a mile distant from Canterbury, was considered not to be void for uncertainty, but to embrace all the hospitals in that city;⁵ and a similar point having arisen, in consequence of the particular objects of bounty not being so minutely described as to be ascertained,⁶ the court, instead of holding the legacy to be void, defeated the claim of the residuary legatee, and ruled that the property, having been devoted to charity, could not be otherwise

“favourite though not exclusive object of the donor.” A subject of this nature will strike different minds in different points of view. We do not see much force in the objection of the learned judge. Besides, it seems to have suggested itself to him in relation to gifts to superstitious uses—a class of cases more favourable to his peculiar views than the general topic under our consideration.

¹ Vide the decision of Lord Thurlow in the case of *White v. White*, 1 Bro. C. C. 14, 15.

² Lord Eldon, in the case of *Morice v. The Bishop of Durham*, 10 Ves. 537, 538.

³ *Miles v. Farmer*, 19 Ves. 483; *Cherry v. Mott*, 1 Myl. & Cr. 131—134.

⁴ *White v. White*, 1 Bro. C. C. 12.

⁵ *Masters v. Masters*, 1 P. Wms. Rep. 420.

⁶ *Simon v. Barber*, 5 Russ. 512.

applied than in accordance with the general intentions of the testator. The nature of the charity indicated by the testator is a material element in the moulding of any scheme which is to be sanctioned by the authority of a court of equity.¹

Again, if the effect of a will be such as to manifest a general disposition to devote a certain sum to charities, although the testator has not absolutely made up his mind as to the particular charities which are to be the recipients of his bounty, a court of equity will order a scheme to be prepared, regard being paid to the nature and character of the other gifts contained in the will. If it be sound law, as, following the current of decisions, it certainly is, that the nomination of particular objects is only the mode, and the gift to charity is the substance of the testamentary disposition, and that the declaration of such a gift is substantially sufficient to give effect to such disposition, it is surely a less violent proposition that, where the testator has himself expressed certain modes by which effect may be given to it, it shall be carried into execution. This point and the slender authority upon which it appears at one time to have rested, is a striking illustration of the sacred respect which even a single judicial determination can command. We allude to the case mentioned by Freeman,² the comparative value of which has been frequently the subject of desultory and unsatisfactory discussion. It may be sufficient to remind our readers that Lord Eldon, who had no liking to the exercise of such discretionary power, considered himself bound by that authority as one which has never been displaced. On the contrary, in another case it was said,³ and the remark was sanctioned by the decision of the court, that there being once a gift to charity, all that remains is as to the mode in which it is to be applied. He pointedly called the attention of the bar to his opinion concerning the disputed authority, and invited counsel to prove, if they could, that the doctrine stated by Freeman was not supported by subsequent

¹ *Hayter v. Trego*, 5 Russ. 115.

² *Pieschal v. Peria*, 2 Sim & Stu. 386.

³ *Freem. Rep.* 40, 261, n.; compare *Moggridge v. Thackwell*, 7 Ves. 43, and the case of *Att.-Gen. v. Syderfin*, 1 Vern. R. 224; 1 Eq. Abr. 96. Of the case of *Wheeler v. Sheer* (*Mosel. R.* 288, 301), Lord Eldon took occasion to observe: "Admitting all that Lord Thurlow has said with regard to the decision in *Wheeler v. Sheer*, it is quite impossible to look into the circumstances of that case, and say that it is a case which at all touches on the doctrine in *Freeman*."

⁴ The case of *Syderfin's will* (1 Vern. 224; 1 Eq. Abr. 96; 7 Ves. 43, n.; 1 Meriv. R. 59, 60). It is sometimes referred to as the case of the *Att.-Gen. v. Syderfin*, and shows, among other things, the distinction drawn between gifts to charities and gifts to individuals. If the case had been one of the latter description, effect could not possibly have been given to it.

cases, and that such subsequent cases were those in which, the testator having actually devoted the residue of his property to charitable purposes, it had, in consequence of some act afterwards done by him or the omission of some act necessary to have been performed, become impossible to discover the object of his intended benevolence.¹ And, after argument, it was again held that such a disposition of the residue in favour of charity would be carried into execution by the court, having regard to the objects particularly pointed out by the testator. So that no one can be surprised at the importance attached by Sir John Leach to the case of *Mills v. Farmer* as an authority.² The principle cannot again be questioned, that in all cases in which the testator has expressed an intention to give to charitable purposes, if the intention be declared absolutely, and nothing is left uncertain except the mode in which it is to be carried into effect, that deficiency will be supplied by the court, and the intention be effectuated upon the principle of approximation.

Further, the court, forming its judgment upon the circumstances presented to it, decides in favour of charity in many cases where the expressions are extremely general and uncertain and inclines in favour of the disposition, *ut res magis valeat*. A legacy, for instance, given "to the poor," there being no words in the will to indicate the particular poor intended, was not considered void for uncertainty as to the description of persons who were to enjoy the bounty. The court looked around with a view to discover circumstances which might enable it to apply the doctrine of *cy près*; and, upon being informed that the testator was a French refugee, the legacies bequeathed by him were ordered to be given to the poor refugees.³ A natural and reasonable construction ought to be given to the language of the instrument. A bequest, for instance, to the poor inhabitants of a certain parish was confined in its operation to such poor as were not receiving parish relief; and upon this sound principle, that to have extended the charity beyond that class of persons would have been substantially a gift of bounty to the rich by diminishing the rate to be levied—a result which could not possibly have been in the mind of the testator. The general import of the word inhabitant was accordingly restricted to a particular class of the poor.⁴ A testator may through ignorance or inadvertency use language to which no definite idea can be attached; and on

¹ *Mills v. Farmer*, 1 Meriv. R. 55.

² *Pieschal v. Peria*, 2 Sim. & Stu. R. 392.

³ Att.-Gen. Rence, referred to by Sir T. Clarke, M. R., in deciding the case of the Att.-Gen. v. Clarke, Ambl. Rep. 422.

⁴ Att.-Gen. v. Clarke, Ambl. R. 422.

such occasions a court of equity will, to meet the justice of the case, go so far even as to ascribe a new meaning to the words employed.¹ The court has gone a step further, for a testator having given an estate charged with the maintenance of certain lecturers to his nephew, who afterwards devised it for payment of his debts, the court, a bill having been in the meantime brought to have the lands sold for payment of debts, upon an information on behalf of the charity, decreed that the growing payments and arrears should be applied to the advancement of the charity, even although there was a deficiency of assets for payment of debts, and although one species of lectureship was to be substituted for another.² Nor is it, according to the expressed opinion of Sir John Leach, necessary that the Master in preparing a scheme should strictly confine himself to the provisions in the will of the founder; whose real intentions, indeed, may be more effectually promoted by an enlarged and liberal interpretation of his views.³ Recollecting the very sensible rule followed by the court in determining questions of this description, that the execution of a trust of a charity will not be decreed in a manner different from that intended, except so far as the intention cannot be literally carried into effect, or another mode be adopted so that the object may be attained in substance though not in form, it seems to follow as a corollary that the failure of a condition which may fairly be considered as merely accessory will not be permitted to defeat the general intention. So, if there are two objects, one of them being a general charitable object and the other annexed to it, it cannot be safely inferred that a testator must, under all circumstances, have intended that they should stand or fall together; the failure of circumstances annexed, a failure which may originate in the neglect of parties, cannot frustrate the general charitable intention. Trivial deviations from the course pointed out by the testator may be safely overlooked rather than that his general purpose of benevolence should be altogether neutralized.⁴ Nay, provided *time* is not of the *essence* of the gift, the court will guard against the claims or even the chances of an heir-at-law, arising out of a temporary obstruction in the way of executing the trust to charity, by immediately declaring its validity.⁵

¹ Fearon v. Webb, 14 Ves. 26.

² Combe's case, mentioned in Att.-Gen. v. Guise, 2 Vern. 266.

³ The Kingsbridge School case, 4 Madd. R. 483.

⁴ Brentham v. East Burgold, referred to by Sir R. P. Arden in the case of Att.-Gen. v. Boulton, 2 Ves. jun. 387; vide Att.-Gen. v. Leigh, decided by Lord Parker, as stated by Sir R. P. Arden, 3 Ves. 389; compare Att.-Gen. v. Rigby, 3 P. Wms. R. 145.

⁵ 2 Bro. C. C. 408; Att.-Gen. v. Green, 3 Ves. 716.

Temptations to the indulgence of a litigious spirit or grasping selfishness have been thus withdrawn, and the catalogue of cases involving no new general principle, although developing an endless variety of individual facts and circumstances affecting the interests of competing claimants and the distribution of property, has thus been wisely prevented from swelling beyond its present very formidable magnitude. An enlarged elucidation of these topics does not fall within the compass of our present design, which is in this respect accomplished by the simple statement, that in administering the surplus rents or income of a charity, approximation to the will of the founder is still the pervading and governing principle.¹

It is, however, obviously possible that a testator may evince an intention of devoting the property to charitable purposes without specifically appointing its application; the trustees or the court being thus left unfettered to select whatever objects they may think proper. In the preceding cases a discretionary power had been given only to determine the mode of administration or to select objects of an expressly defined charity; but before drawing these remarks to a close, it may be proper very briefly to allude to a few principles and cases in which there will be found ample illustration of the expansive nature of the doctrine under review.

If it be a settled principle that the nomination of particular objects is only the mode, and the gift to charity the substance of the testamentary disposition, it would surely be repugnant to equity, which is said to be the perfection of reason, to hold, that because a testator having specified certain modes in which effect might be given to his charitable gift, and having expressed an intention to indicate others, which he neglects subsequently to define, the object which he had in view should be altogether defeated; in other words, that his general intention should fail of taking effect. Lord Eldon, while he admitted that the court had taken great liberties in the moulding of charities,² seems to have regarded the point in this light. Since the utter impossibility of a certain prescribed mode taking effect is not allowed to frustrate a general intention, surely mere uncertainty ought not to have a more stringent operation. The non-nomination of additional purposes³ which may really have been in the

¹ A general statement of the doctrine of *cy pres* will be found in the judgment of Sir James Wigram (7 Hare, Rep. 589) in the case of *Monypenny v. Dering*.

² Vide his language in the case of the *Att.-Gen. v. Doyley*, 7 Ves. 58, n.; and compare what fell from him, as reported in 1 Meriv. R. 101, 102, 103.

³ *Miles v. Farmer*, 1 Meriv. R. 55; 19 Ves. 488. The words of the will were: "The rest and residue of all my effects I direct may be divided for pro-

mind of the testator, cannot reasonably be restrictive of the generality of a prior absolute gift to charity.

Again, the interference of a court of equity may be rendered necessary by the decease of a trustee during the life of the testator, before he has undertaken the execution of the trust or fully carried it, if undertaken, into effect. Under circumstances of this description Lord King said,¹ that the substance of the charity remained notwithstanding the death of the trustees, and for this reason, that although the fund could not be distributed by the very hands which the testator intended should have been the medium through which his bounty might be transmitted, the charity itself, being the substance and reason of the devise, still subsisted, and might be as effectually realised by the Court of Chancery as if the party in whom the trust had been specially reposed had been alive. Although at law a legacy, under such circumstances, has lapsed, it is in equity to be regarded as subsisting. The same expansion was given to the principle by Lord Hardwicke, who laid hold of the fact of the Attorney-General having been made a party to a suit, with a view to sustaining a charity which must otherwise have been defeated, as a ground upon which he might decree that the fund in question was to be disposed of in such charities as the aldermen for the time being and the principal inhabitants of a certain ward should consider the most beneficial to the interests which the testator had in view,² although the nature of the charitable objects had been left altogether vague and indefinite by him, or more accurately speaking, although no allusion at all had been made to any objects of his bounty, which was only to be circumscribed by certain local limits.³

It would appear, likewise, that if the trustees nominated decline to undertake the duties required of them, these must, in that event, be discharged by the Court of Chancery; and the language of Lord Eldon shows that anticipation of difficulties in executing the will of the testator cannot turn equity from its

moting the Gospel in foreign parts and in England, for bringing up ministers in different seminaries, and other charitable purposes, *as I do intend to name hereafter.*"

¹ *Att.-Gen. v. Hickman*, 2 Eq. Ca. Abr. 194, s. 14.

² *Baylis and Church v. Att.-Gen.*, 2 Atk. R. 249. Lord Eldon (7 Ves. 77), in alluding to this case, said that, considering the principle recognised, it had gone very far in disappointing the next of kin.

³ The testator had in this case manifested an intention to entrust the disposal of his legacy to some individual, although, at the time of making his will, he had not determined who that individual should be; it is therefore in this respect, at least, analogous to the case in which, in consequence of the death of the trustee during the lifetime of the testator, there is no one to execute the trust at the decease of the testator.

course. In the case of *Price v. The Archbishop of Canterbury*¹ there were words and peculiarities which created much perplexity as to the best mode of satisfying the intention; but Lord Eldon, after weighing them all, arrived at the conclusion that the next of kin and the executors were excluded from participating in the residue.

And, finally, while there can be no doubt as to a court of equity possessing an authority which may, on proper occasions, be exerted so as to control the discretionary acts of a trustee, it is only under the pressure of circumstances and in the hope of averting or correcting abuses that its superintending power will be moved into action. The court does not supersede the discretion of the individual in whose prudence the founder has thought proper to confide; but equity will raise it if it should through inadvertence stumble, and call it back to the straight path, if it should blindly or perversely wander.² Nor does the court, while displacing a discretionary act of another, merely substitute one of its own.³ The aim, as it is the duty, of the court is neither more nor less than fairly and dispassionately to execute the trust, by guarding against the suggestions of folly or corruption; it declines to clothe a new trustee with the power which strictly belonged only to his predecessor.⁴

Such, then, in its prominent features, is the Equitable Doctrine of Approximation. Having traced its origin and the line of demarcation drawn between the jurisdiction of the crown and of the Court of Chancery, we have examined the subject in its negative as well as its affirmative aspect; and as we introduced the latter by establishing the right which courts of equity originally assumed to interpose their authority, so have we closed it with an elucidation of its gradually expanding power; for although the judges have, in more recent times, been disposed to curb the excessive latitude of construction which had been, from an early period sanctioned, still strong, and, in some points

¹ 14 Ves. 364, where the bequest was partly to relations and partly to charity; there was also uncertainty as to the proportions in which the fund was to be distributed among the objects named. That circumstance, however, was not allowed to defeat the intention of the testator.

² Vide the language of Lord Hardwicke, in the case of the *Att.-Gen. v. Governors of Harrow School*, 2 Ves. sen. 551; *Webb v. Earl of Shaftesbury*, 7 Ves. 87.

³ Lord Eldon, in *Dummer v. The Corporation of Chippenham*, 14 Ves. 245.

⁴ *Hubberd v. Lambe*, Ambl. R. 309, where Lord Hardwicke remarked, that "as the testatrix had confined the power to her executors only, this court could not give it to a new trustee;" and in the case of *Down v. Worrall* (1 Myl. & K. 568) trustees, who had a personal discretion as to the application of a fund, having died without executing that discretion, Sir John Leach held that part of the property to be undisposed of by the testator.

of view, anomalous though the doctrine may appear to be, the principles which we have endeavoured, however imperfectly, to illustrate have taken too deep root in the soil of English jurisprudence to be easily shaken.

In questions of this description the authorities are not to be regarded as under all circumstances absolutely binding; they simply furnish lights and afford examples which may assist us in weighing probabilities and applying common sense to detect the real intention of a testator. It is thus that the more elastic jurisdiction of courts of equity have been found so admirably to adapt itself to the ever-varying form of such questions. Less fettered than the courts of common law by the trammels of technicality, they have proved themselves equal to every emergency, and have directed the stream of private munificence to the growth and prosperity of the state. It is not easy to catch principles floating through so wide a sea of cases; nor, when caught, is it occasionally less difficult to discover whence they come or whither they tend: but our object has been attained if we have succeeded in preparing the reader for encountering the phalanx of materials to be found in the Reports or in the compilations of modern text books, which, in respect of confused and cumbersome prolixity, might rival the indiscriminate laboriousness of a Charity Commission itself.

E. R.

ART. III.—MAY'S PRACTICE IN PARLIAMENT.

A Practical Treatise on the Law, Privileges, Proceedings and Usages of Parliament. By Thomas Erskine May, Esq., of the Middle Temple, Barrister-at-Law, one of the Examiners of Petitions for Private Bills, and Taxing Officer of the House of Commons. Second Edition, pp. 644. London: Butterworths.

WHATEVER may have been, or may be, thought of the benefit derived from the changes introduced by the Reform Act of 1832, there cannot be a doubt that it has had a very powerful effect in altering the position of members of parliament in the house itself. There was not a greater difference between the representative, sent by his fellow townsmen in the days of the Edwards and the Henries, at the expense of his borough, to tax and to come home, and the followers of the patron or the minister, sitting for boroughs with a handful of voters, in the days of the Georges, than there is between these same members of the Georgian era and the existing representatives of the 50*l.* tenants and the 10*l.* householders. Four centuries ago the passing of laws and the amount of taxes voted were comparatively short and light matters; the session seldom lasted eight weeks; the laws were few; the taxes of no enormous amount; the standing army existed not; the royal fleet might be numbered by units; the army, navy, ordnance, and miscellaneous estimates were unknown; and the same class of men who could fill with satisfaction the office of mayor, could readily perform all the duties of a representative at Westminster. Thirty years ago a very small portion of the members took part in the debates, or exercised their ingenuity further than to record their votes. Only a few took any active part in the house, or in the committees, and few, therefore, needed any other manual of practice than was to be found in Mr. Hatsell's well-arranged, though not perfectly digested, *Collection of Precedents*. Now, however, a new class has sprung up. Members having constituents are required to be quite as diligent in their votes as they were when the patron sent them, and far more attentive to, and far better versed in, the rules and usages of the house itself. More members take part in the debates on bills, as well as on abstract motions; more serve on committees; and more introduce independent subjects of legislation: indeed, some of our best legislative amendments have proceeded from honourable members who were neither members of the government nor recognised leaders of the opposition. Sir Robert Peel saw the importance

of the change, and the value of the political education to be acquired by young members when they take part in the ordinary business of the house and of the committees. His own selections for office added force to his verbal acknowledgments, and henceforth it will be necessary for every member to educate himself up to the general standard of parliamentary knowledge.

Nor is the necessity confined to the public business. The mass of private legislation presses upon the whole body no less than upon individual members. Since the division of the house into pannels for election committees, and the personal responsibility created by the reduction of the numbers, from eleven chosen by chance to five taken by selection, and since the division of private bills into groups, in each of which members unconnected with the locality have to decide upon the merits of rival or competing plans in the presence of members who know the district well, it has become impossible for members to remain merely voting machines. True it is, that the numbers of private bills, which passed the house at the commencement of the present century, ranged in each of the years, as under—

	Local and Personal Acts.			Private.
1801	.	.	146	141
1802	.	.	119	120
1803	.	.	147	120

Equally true it is, that the numbers of local and personal acts which have become the law during the last five years, have been—

	Local and Personal.		Private, Printed.	Private, not Printed.
1843	.	110	29	10
1844	.	108	34	15
1845	.	204	33	4
1846	.	402	43	8
1847	.	297	35	3
1848	.	163	22	5
1849	.	95	26	8
1850	.	112	18	7

This, however, does not include the large number of bills lost in their various stages,¹ and the difference in the character of the bills at the two periods is so great, that no comparison can be formed of the labour and time taken up in passing them through their various stages; for, whereas the private acts of fifty years since consisted mainly of inclosure acts, turnpike acts, and

¹ In the present session of parliament (1851) there were 216 petitions for private bills deposited at the Private Bill Office in the Commons; these were exclusive of estate and divorce bills, which usually originate in the Lords.

estate acts,—now these have nearly disappeared, and their places have been supplied by railway bills, dock bills, and other acts, which require far closer attention, affect far greater interests, and are of much larger national importance; the General Inclosure Act of 1801 paved the way for other general acts,—such as the Companies Clauses Consolidation Act, the Lands Clauses Consolidation Act, the Health of Towns Act, the Police Clauses Act, and other acts,—which have simplified the technical details of private bills relating to those subjects, and the increased number and vigilance of parliamentary agents tend in some degree to relieve the labours of committees; still every change makes it more important that the principle and the details of each particular measure should be more strictly scrutinised, and the rules and practice of each house more strictly adhered to.

It is manifest that a manual of practice in the house and above stairs has thus become as essential to the members of the tribunal, who have to take part in the proceedings, and in most cases to decide, as it is to the solicitors or the parliamentary agents, who have to submit the measures for consideration, or who have to oppose them on their merits, or on their provisions. The patience and the courtesy of the present Speaker are well known. There is not a member who has ever asked his advice, or his opinion, but has received a ready, a prompt, and an accurate reply; yet much of the trouble given to the highest officer of the house might be spared, and much of the member's time might be saved, by a simple reference to an established written authority. Such is the work of Mr. May, which comes before us in a revised and enlarged form, and has received the great benefit of Mr. Speaker's assistance. The original work has stood the test of experience; it has been found concise and of ready reference; and in spite of the many alterations embodied in the present edition, we find it improved in the very points on which it first merited the most praise. It does not give, or attempt to give, the full precedents which can be so easily turned to in Hatsell; it does not attempt to supersede that most valuable work, nor Mr. Rogers's well-known work on Elections; it attains a value entirely its own; it gives so much of the constitution of the two houses, and so much of their history, as enables us to understand the principles of the rules which govern their proceedings; and then it gives those rules and the forms observed so plainly and so shortly, that any man who has never sat in the house, or has never given notice for, or solicited a private bill, will be able to understand both theory and practice alike.

We do not propose to follow Mr. May through the divisions of his work, or to abridge what is of itself sufficiently short for all purposes. A few topics only need be referred to for instruction or for illustration, and a few for observation, if not for correction.

In the preliminary chapter on the constituent parts of parliament for instance, we are not disposed wholly to agree with Mr. May, or with his historical conclusions. There have been other authorities besides those to which he makes reference, which have treated of the origin of the representative body, and of the alterations, by which the Commons, step by step, acquired and consolidated their power; and we are disposed to give a very early date to the exercise of most of those functions which have made it the chief ruling body in the state. Among these works is one by Sir Roger Twysden, (Camden Soc. publications, 1849,) entitled "*Certaine Considerations upon the Government of England*," in which the whole question of the three estates is most ably set forth. In one particular, it clears up a matter which Mr. May leaves in some confusion—the difference between the councils summoned for advice and the supreme council of the nation or parliament. Mr. May says—

"The practice of summoning citizens and others before the council for particular purposes continued long after the regular summons of members to parliament from cities and boroughs had commenced."

Important instances of these summonses are to be found in the reign of Edw. III. (Rymer's *Fœd.* vol. 2 and 3), when, in 1342 and 1344, during our national struggles with France, the king summoned from the chief maritime towns two of the most sufficient men, and of the best naval knowledge, "to consult and advise with the king," and "to meet other naval men and consult on the state of the navy;" but these summonses do not include the summonses for advice to the king himself on his affairs generally in the grand council, or, as Sir Roger Twysden better puts it, the privy council. He observes—

"That the grand councell is often tymes no other then the privy councell is apparent in that sundry bills in parliament are to bee heard '*devant le grand council*,' which were wayne, taking it onely for the lords out of parliament, who had all ready given their approbation of it, and therefore must of necessity bee somewhat differing from them, which was to give his majesties answer to it; it is likewise sometymes with this explanation, that it is his '*grant et continuel council*.' The 5 Henry 4, the king, at the request of the commons, did nominate certayn lords, and others, viz. 6 bishops, 1 duke, the lord treasurer, privy seal, 4 barons, and 3 gentlemen, in all 22, '*d'estre de son grant et continuel council*,' which would bee no other then his

privy counsell. See *Bundel Petit apud Winton, ante Fest. Gregor. 4 Ed. 3, n. 73; Rot. Parl. 7 Hen. 4, n. 31, 84, 89, 106; 11 H. 4, n. 39.*

"If I should hold the great counsell to bee any other body distinct from the privy counsell, I should conceive it confined to no number or quality of persons whatsoever, but such as were upon some especiall occasion called by his majestie as assistants to him and his privy counsell. Such I take that mentioned in a parliament 5 Hen. 4, which expresses that before Christmas last past it had pleased the king 'd'envoyer pur certains seigneurs espirituelx et temporelx et pour plusiours gentrex et autres persones suffieiant de son royaume, pur estre conseillex par eux,' etc. touching the safeguard of the sea and the rebels in Wales, whose consultations were adjourned to this parlyament.

"I have seene a letter in English from Hen. the 6. to the abbot of Bury, preserved in a leiger booke of that house, in (which) the king willeth him, 'That for certaine great and chargeable matters touching the good and weale of us, our realms, lordships and subjects, wee will and charge you streightly that yee bee with us, and our counsell, at our pallace of Westminster, at the quindecem of Pasque next coming, to commune with us and them, and give good (counsell) in the matters abovesaid, etc. Yoeven under our privy seal, at our mannor of Sheene, the 2 of March. Directed,

"To our deere in God the Abbot of Bury.'

"I can not doubt but this was a convocating of some counselors to treat with his privy counsel, and perhaps may not unfitly bee thought his grand counsell, though I doe not find that name attributed unto it; it sufficeth for my purpose that our kings have for the most had a sad and wise counsell for their weighty affaires, and they following such directions as from tyme to tyme hath beene recommended by them, without exorbitantly extending their auctority, the subject hath seene his owne happynesse, and hath beene both willing and able to support extraordinary supplies, and ready to undergoe (knowing their condition not to bee mended) any danger they would expose them to, God crowning their actions with successe both at home and abroad."

And we agree with Sir Roger Twysden in the opinion expressed in the following passage.

"Wherever we find the people said to have joyned in any action with the King and nobility in counsell, I cannot but think that an assembly of the 3 estates, which wee call a parlyment, for, it beeing impossible the great body of the Commons should come toogether but by their representees, and finding they did assent to matters of weight, wee cannot conclude they did it otherwise than by their deputies.

Except for historical accuracy the inquiry would not be worth pursuing any further; since it is of the present, and not of the past, that Mr. May has most to treat; with the present he has been for many years familiar, and herein he displays a thorough knowledge. His illustrations are full. There are however in-

stances, in which acts of parliament and resolutions referred to by him, have been wholly set at defiance. In 1768 the Hon. Charles James Fox, then only 19 years of age, was returned and sat for Midhurst, (this early introduction being auspicious to his future celebrity,) in direct contravention of the act of 7 & 8 Will. III. c. 25, s. 8, carrying out the earlier resolution of the Lords, "that according to the law of the realm and the ancient constitution of parliament minors ought not to sit in parliament;" and from the days of Elizabeth, when (1584) Lord Buckhurst and Lord Montague wrote to the Sheriff of Sussex in favour of two candidates for Sussex, and the last named Lord prayed the Sheriff to make his wish and desire known to the freeholders for the two candidates "as for two such as I think most fitt and to whome I have given my consent and earnestlie request my friends to do the same;"—in 1623 during the reign of the Charles, when the burgesses of Steyning were told by the Earl of Arundel and Surrey, that "in regard many townes are depopulated and some are so impoverished as it would be heavy unto them to support the charge incident (to the wages,) it hath been a usage of long continuance of most townes to make choise of such foreigners as were fitt and worthy of the places, and herein to have recourse to the tender made unto them of able men by their chief lords, and so my ancestors have done unto your predecessors;"—through the period of Walpole's administration, when the Duke of Newcastle in 1734 returned "very victorious from Sussex," after having at the election for Hastings in 1721-2 thought it not enough to sit with the corporation "to recommend to them expressly one member and to declare his good opinion and wishes for another, which differs nothing from the recommending of two, but after this to go round the town to solicit the votes of the particular electors;" down to the most recent times, when it is not thought gentlemanly to canvass a noble lord's tenants till his lordship has given his assent;—during all this time the Peers have interfered in elections; they refused to recognize the resolution of the Commons of 1700; and the latter's annual resolution, that it is high infringement of their liberties and privileges for any lord of parliament to concern himself in the election of members to serve for the Commons, has been a mere *brutum fulmen*. The law has been one way and the practice another.

It has formed no part of Mr. May's plan to note these discrepancies; but when the shortcomings of the Commons must be noticed, and the cases of *Stockdale v. Hansard* and of *Howard v. Gosset* are fairly before him, he gives a very calm review of the proceedings of the Commons—weak and wavering and

indecisive after they ceased to be guided by Lord Truro's advice;—and then sums up the whole with these excellent remarks :

“Thus far the course adopted by the house led, for the present, to a fortunate termination of their contests with the courts of law; but if the judgment had been adverse to their privileges, they would have been involved in still greater embarrassments. It is to be hoped that further contests may be very remote; but it must be acknowledged that the present position of privilege is, in the highest degree, unsatisfactory. Assertions of privilege are made in Parliament, and denied in the courts; the officers who execute the orders of Parliament are liable to vexatious actions, and if verdicts are obtained against them, the damages and costs are paid by the Treasury. The parties who bring such actions, instead of being prevented from proceeding with them by some legal process acknowledged by the courts, can only be coerced by an unpopular exercise of privilege, which does not stay the actions. If Parliament were to act strictly upon its own declarations, it would be forced to commit not only the parties, but their counsel and their attorneys, the judges, and the sheriffs; and so great would be the injustice of punishing the public officers of justice for administering the law according to their consciences and oaths, that Parliament would shrink from so violent an exertion of privileges. And again the intermediate course adopted in the case of *Stockdale v. Hansard*, of coercing the sheriff for executing the judgment of the court, and allowing the judges who gave the obnoxious judgment to pass without censure, is inconsistent in principle, and betrays hesitation on the part of the house—distrust of its own authority, or fear of public opinion.

“A remedy has already been applied to actions connected with the printing of parliamentary papers; and a well-considered statute, founded upon the same principle, is the only mode by which collisions between Parliament and the courts of law can be prevented for the future. The proper time for proposing such a measure is when no contest is pending; and when its provisions may be calmly examined, without reference to a particular privilege, or a particular judgment of the courts. It is not desired that Parliament should, on the one hand, surrender any privilege that is essential to its dignity, and to the proper exercise of its authority; nor on the other, that its privileges should be enlarged. But some mode of enforcing them should be authorized by law, analogous to an injunction issued by a court of equity to restrain parties from proceeding with an action at common law, and even with a private Bill in Parliament; and such a prohibition should be made binding, not only upon the parties, but upon the courts.”—pp. 163, 164.

On many subjects connected with the proceedings in both houses the information conveyed by Mr. May is generally interesting; witness his account of proxies in the Lords and of pairs in the Commons.

"In the lords not only those peers who are present may vote in a division, but, on certain questions, absent peers are entitled to vote by proxy, and their votes are numbered with the rest; the joint majority of votes and proxies being decisive of the question. The following rules and restrictions are incident to the right of voting by proxy;—

"No lord of this house shall be capable of receiving above two proxies, nor more to be numbered in any cause voted. All proxies from a spiritual lord shall be made to a spiritual lord, and from a temporal lord to a temporal lord.

"If a peer having leave of the king to be absent from Parliament, gives his proxy, and afterwards sits again in the house, his coming and sitting again in Parliament doth determine that proxy.

"If a peer having leave to be absent, makes his proxy and returns, he cannot make a new proxy without new leave.

"That proxies may be used in preliminaries to private causes, but not in giving judgment.

"That no proxy for the future shall be made use of in any judicial cause in this house, although the proceedings be by way of bill. And this rule is extended to the trial of controverted elections of the representative peers of Scotland.

"That a lord having a proxy and voting on the question ought to give a vote for that proxy in case proxies be called for.

"That the proxy of no lord shall be entered the same day on which he has been present in the house, and that no proxy entered in the book after three of the clock, shall be made use of the same day in any question, and that the clerks give an account thereof to the house."

"It is also a rule that no proxy can be used in a committee of the whole house.

"The most usual practice is for lords to hold the proxies of other lords of the same political opinions, and for the votes of both to be declared for the same side of a question. This is the true intent of a proxy; but it occasionally happens, that a lord has been privately requested by another lord, whose proxy he holds, to vote for him on the opposite side; in which case, it is understood to be regular to admit their conflicting votes in that manner. But it is said, that this variation from the ordinary rule is permitted upon the supposition, that between the time of voting and of declaring the vote of the proxy, a lord may be supposed to have altered his own opinion; for the form of the proxy would appear to delegate to the lord who holds it, the absolute right of decision for the absent lord, without any reference to the opinions of the latter, expressed after the signature of that instrument.

"A practice, similar in effect to that of voting by proxy, has for many years been resorted to in the House of Commons. It has been shown, that no member can vote unless he be present when the question is put; and no sanction has ever been given, by the house, to any custom partaking of the character of delegation. But a system of negative proxies, known by the name of pairs, enables a member to

absent himself, and to agree with another member that he also shall be absent at the same time."—pp. 278, 279.

When Mr. May gives the mode of conducting public business in debate he is succinct and extremely useful. Very few persons, even of those who are called upon to preside at public meetings or at Boards for the management of Companies or Societies, are aware of the mode in which public business can be most efficiently conducted. The rules of proceeding in the two houses of parliament are assumed to be the model, but it frequently happens, although Peers and Prelates are in the chair, that neither the party presiding nor the body of the meeting has any distinct notion of what those rules are. In both houses every matter must be determined on a motion put by the Speaker and affirmed, negatived, or avoided by the house itself. Notice of the motion is given for convenience sake in the Lords, and the quantity of business has not required any strict rule as to time. In the Commons the case is different, and the pressure of motions brought forward by individual members has led to a sessional resolution, which prevents the Order Book from being occupied on motion days for more than a fortnight in advance, if the motion be opposed or likely to lead to debate; no positive rule is laid down as to the time which must elapse between the notice and the motion; motions for leave to bring in bills of trifling interest and for returns are frequently given on the day preceding the motion; for unopposed returns there is a separate notice paper, and they are brought on at any convenient period. An unopposed motion, if no member object, may be brought on by consent of the house without previous notice; whilst matters directly concerning the privileges of the house, provided they have arisen recently, are brought on without notice, and have precedence of orders of the day as well as of notices of motion. If the question be simply resolved in the affirmative or negative there is little trouble; it is when the question is sought to be evaded or superseded that the difficulty arises; and here Mr. May tells us that,—

"The modes of evading or superseding a question are, 1, by adjournment of the house; 2, by motion 'that the orders of the day be read;' 3, by moving the previous question; and 4, by amendment.

"1. In the midst of the debate upon a question, any member may move 'that this house do now adjourn,' not by way of amendment to the original question, but as a distinct question, which interrupts and supersedes that already under consideration. If this second question be resolved in the affirmative, the original question is superseded: the house must immediately adjourn, and all the business for that day is at an end. The motion for adjournment, in order to supersede a

question, must be simply that the house do now adjourn; it is not allowable to move that the house do adjourn to any future time specified; nor to move an amendment to that effect, to the question of adjournment. The house may also be suddenly adjourned by notice being taken that forty members are not present, and an adjournment caused in that manner has the effect of superseding a question in the same way as a formal question to adjourn, when put and carried. In either case the original question is so entirely superseded, that if it has not yet been proposed to the house by the speaker, it is not even entered in the Votes, as the house was not fully in possession of the question before the adjournment.

"If a motion for adjournment be negatived, it may not be proposed again without some intermediate proceeding; and, in order to avoid any infringement of this rule, it is a common practice for those who desire to avoid a decision upon the original question, on that day, to move alternately that 'this house do now adjourn,' and 'that the debate be now adjourned.' The latter motion, if carried, merely defers the decision of the house, while the former, as already explained, supersedes the question altogether: yet members who only desire to enforce the continuance of the debate on another day, often vote for an adjournment of the house, which, if carried, would supersede the question which they are prepared to support. This distinction should always be borne in mind, lest a result should follow that is widely different from that anticipated. Suppose a question to be opposed by a majority, and that the minority are anxious for an adjournment of the debate; but that on the failure of a question proposed by them to that effect, they vote for an adjournment of the house: the majority have only to vote with them and carry the adjournment, when the obnoxious question is disposed of at once, and its supporters have themselves contributed to its defeat.

"2. On a day upon which motions have precedence, a motion, 'that the orders of the day be now read,' is also permitted to interrupt the debate upon a question; and if put by the speaker and carried in the affirmative, the house must proceed with the orders of the day immediately, and the original question is thus superseded. A motion for reading a particular order of the day, however, will not be permitted to interrupt a debate; and when the house are actually engaged upon one of the orders of the day, a motion for reading the orders of the day is not admissible, as the house are already doing that which the motion, if carried, would oblige them to do.

"3. The previous question is an ingenious method of avoiding a vote upon any question that has been proposed, but its technical name does little to elucidate its operation. When there is no debate, or after a debate is closed, the speaker puts the question, as a matter of course, without any direction from the house; but, by a motion for the previous question, this act of the speaker may be intercepted and forbidden. The words of this motion are, 'that this question be now put;' and those who wish to avoid the putting of the original question, vote against the previous (or second) question; and, if it be re-

solved in the negative, the speaker is prevented from putting the original question, as the house have refused to allow it to be put. It may, however, be brought forward again on another day, as the negation of the previous question merely binds the speaker not to put the main question at that time. If the previous question be put, and resolved in the affirmative, no words can be added to or taken from the main question by amendment; nor is any further debate allowed, or motion for adjournment before the question is put, as the house have resolved that the question be now put, and it must accordingly be put at once to the vote. In reference to this proceeding, it may be remarked, that according to the strict rule of debate, each member should speak directly to the question before the house; and, supposing this to be observed, the debate upon the previous question would be limited to the propriety of putting the question now, or at a future time; but, practically, the main question is discussed throughout. If the rule were not evaded in this manner, the main question would be altogether excluded from discussion, merely because another question had been interposed; although, by affirming the previous question, the house would have agreed that the main question was a proper one to have been offered for their decision.

"The last two questions, viz. for reading the orders of the day, and the previous question, may both be superseded by a motion for adjournment; for the latter may be made at any time (except, as already stated, when the previous question has been resolved in the affirmative), and must always be determined before other business can be proceeded with. The debate upon the previous question may also be adjourned; as there is no rule or practice which assigns a limit to a debate, even when the nature of the question would seem to require a present determination. But when a motion has been made for reading the orders of the day, in order to supersede a question, the house will not afterwards entertain a motion for the previous question; as the former motion was itself in the nature of a previous question.

"4. The general practice in regard to amendments will be explained in the next chapter; but here such amendments only need be mentioned as are intended to evade an expression of opinion upon the main question, by entirely altering its meaning and object. This may be effected by moving the omission of all the words of the question, after the word 'that' at the beginning, and by the substitution of other words of a different import. If this amendment be agreed to by the house, it is clear that no opinion is expressed directly upon the main question, because it is determined that the original words 'shall not stand part of the question;' and the sense of the house is afterwards taken directly upon the substituted words, or practically upon a new question. There are many precedents of this mode of dealing with a question; but the best known in parliamentary history are those relating to Mr. Pitt's administration, and the peace of Amiens, in 1802. On the 7th May, 1802, a motion was made in the Commons for an address, 'expressing the thanks of this house to his Majesty for having been pleased to remove the Right Hon. W. Pitt

from his councils;’ upon which an amendment was proposed and carried, which left out all the words after the first, and substituted others in direct opposition to them. Not only was the sense of the original question entirely altered by this amendment, but a new question was substituted, in which the whole policy of Mr. Pitt was commended. Immediately afterwards an address was moved in both Houses of Parliament, condemning the treaty of Amiens, in a long statement of facts and arguments. In each house an amendment was moved and carried by which all the declamation in the proposed address was omitted, and a new address resolved upon, by which Parliament was made to justify the treaty.

“ This practice has often been objected to as unfair, and never with greater force than on these occasions. It is natural for one party, commencing an attack upon another, to be discomfited by its recoil upon themselves, and to express their vexation at such a result; but the weaker party must always anticipate defeat in one form or another. If no amendment be moved, the majority can negative the question itself, and affirm another in opposition to the opinions of the minority. On the very occasion already mentioned, of the 7th May, 1802, after the address of thanks for the removal of Mr. Pitt had been defeated by an amendment, a distinct question was proposed and carried by the victorious party, ‘ That the Right Hon. W. Pitt has rendered great and important services to his country, and especially deserves the gratitude of this house.’ Thus, if no amendment had been moved, the position of Mr. Pitt’s opponents would have been but little improved, as the majority could have affirmed or denied whatever they pleased. It is in debate alone that a minority can hope to compete with a majority: the forms of the house can ultimately assist neither party; but, so far as they offer any intermediate advantage, the minority have the greatest protection in forms, while the majority are met by obstructions to the exercise of their will.

“ These are the four modes by which a question may be intentionally avoided or superseded; but a question is also liable to casual interruption and postponement from other causes; as, by a matter of privilege, words of heat between members in debate, a question of order, a message from the other house or a motion for reading an act of parliament, an entry in the Journal, or other public document. The rule, by which such documents are permitted to be read, though not absolutely without recognition in modern times, is so far restrained by more recent regulations with regard to motions and orders of the day, that it is almost obsolete, and a member would scarcely be permitted to avail himself of it, except for the purpose of reading some document strictly relevant to the question under discussion. These proceedings, however, may obstruct and delay the decision of a question, but do not alter its position before the house; for, directly they are disposed of, the debate is resumed at the point at which it was interrupted. In the House of Commons, another interruption was sometimes caused by moving that candles be brought in; but, by a standing order of the 6th February, 1717, it was ordered,

‘That when the house, or any committee of the whole house, shall be sitting, and daylight be shut in, the serjeant-at-arms attending this house do take care that candles be brought in, without any particular order for that purpose.’

“If a question be complicated, the house may order it to be divided, so that each part may be determined separately. A right has been claimed, in both houses, for an individual member to insist upon the division of a complicated question; but it has not been recognized, nor can it be reasonable to allow it, because, 1st, the house might not think the question complicated; and, 2ndly, the member objecting to its complexity, may move its separation by amendments.”—pp. 216—222.

“When all preliminary debates and objections to a question are disposed of, the question must next be put, which is done in the following manner. The speaker, if necessary, takes a written or printed copy of the question, and states or reads it to the house, at length, beginning with ‘The question is, that.’ This form of putting the question is always observed, and precedes (or is supposed to precede) every vote of the house, however insignificant, except in cases where a vote is a formal direction, in virtue of previous orders; as where private bills having been read a second time, are referred to the Committee of Selection.

“In the Lords, when the question has been put, the speaker says, “As many as are of that opinion say ‘content’” and “as many as are of a contrary opinion say ‘not content;’” and the respective parties exclaim ‘content’ or ‘not content,’ according to their opinions. In the Commons, the speaker takes the sense of the house by desiring that “as many as are of that opinion say ‘aye,’” and “as many as are of the contrary opinion say ‘no.’” On account of these forms, the two parties are distinguished in the Lords as ‘contents’ and ‘not contents,’ and in the Commons as the ‘ayes’ and ‘noes.’ When each party have exclaimed according to their opinion, the speaker endeavours to judge, from the loudness and general character of the opposing exclamations, which party have the majority. As his judgment is not final, he expresses his opinion thus: “I think the (‘contents’ or) ‘ayes’ have it;” or, “I think the (‘not contents’ or) ‘noes’ have it.” If the house acquiesce in this decision, the question is said to be ‘resolved in the affirmative’ or ‘negative,’ according to the supposed majority on either side; but if the party thus declared to be the minority dispute the fact, they say “no; the ‘contents’ (or ‘not contents’) the ‘ayes’ (or ‘noes’) have it:” and the actual numbers must be counted, by means of what is called a division.

“The question is stated distinctly by the speaker; but in case it should not be heard, it will be stated again.”—pp. 223, 224.

All this is fully supported by the authorities quoted in the notes.

The chapter on amendments to questions, and on amendments to proposed amendments, is equally clear. The amendments

may be made, 1. By leaving out certain words; 2. By leaving out certain words in order to insert or add others; and 3. By inserting or adding certain words; and of amendments no notice is required, nor is the member, who has given notice, entitled thereby to any precedence.

“Several amendments may be moved to the same question, but subject to these restrictions: 1. No amendment can be made in the first part of a question, after the latter part has been amended, or has been proposed to be amended, if a question has been put upon such proposed amendment. But if an amendment to insert or add words to a question be withdrawn, by leave of the house, the fact of that amendment having been proposed will not preclude the proposal of another amendment, affecting an earlier part of the question, so long as it does not extend farther back than the last words upon which the house have already expressed an opinion: for the withdrawal of the first amendment leaves the question in precisely the same condition as if no amendment had been proposed. Each separate amendment must be put in the order in which, if agreed to, it would stand in the amended question; but should a member, being in possession of the house, move an amendment, another member may propose to amend an earlier part of the question, and his amendment, though proposed the last, will be put first to the vote. 2. When the house have agreed that certain words shall stand part of a question, it is irregular to propose any amendment to those words, as the decision of the house has already been pronounced in their favour. But this rule would not exclude an addition to the words, if proposed at the proper time. 3. In the same manner, when the house have agreed to add or insert words in a question, their decision may not be disturbed by any amendment of those words.

“But when a member desires to move an amendment to a part of the question proposed to be omitted by another amendment, or to alter words proposed to be inserted, it is sometimes arranged that only the first part of the original amendment shall be formally proposed, in the first instance, so as not to preclude the consideration of the second amendment. The convenience of the house may also be consulted, in some cases, by the withdrawal of an amendment, and the substitution of another, the same in substance as the first, but omitting certain words to which objections are entertained. Another proceeding may also be resorted to, by which an amendment is intercepted, as it were, before it is offered to the house, in its original form, by moving to amend the first proposed amendment. This can be done when the original amendment proposed is, to leave out or to insert or add certain words: or when certain words have been left out of a question, and it is then proposed to insert or add other words instead thereof. In such cases an amendment may be proposed to the proposed amendment, and the questions put by the speaker thereupon deal with the first amendment as if it were a distinct question, and with the second as if it were an ordinary amendment.

* * * * *

“ It must be observed, that no motion to amend a proposed amendment can be entertained, until the amendment has, for the time, assumed the place of the original question, and become, as it were, a substantive question itself; otherwise there would be three points under consideration at once, viz. the question, the proposed amendment, and the amendment of that amendment. But when the question for adopting the words of an amendment is put forward distinctly, and apart from the original question, no confusion arises from moving amendments to it, before its ultimate adoption is proposed.”—pp. 228—231.

The proceeding is no doubt complicated, yet, as here explained, it is perfectly intelligible. The rules with reference to petitions are also given in a way to be of considerable use to those who promote petitions, to be sent up stairs to a sub-committee, to be by them classified, and to be reckoned of value according to the number of the signatures and the vigilance of the getters up, rather than according to their intrinsic importance. It is a common notion that the number of petitions has fallen off since the rules of the House of Commons have prevented any discussion on their presentation; but such is not the case. The numbers presented during the last two sessions will show how widely a knowledge of the technical rules of the House requires to be extended. During the session of 1849, there were seventy reports presented to the House by the committee on public petitions, giving an analysis of (in round numbers) 9700 petitions; in the session of 1850, their reports amounted to seventy-five, and fill two large volumes, the number of petitions having increased to 16,100, owing principally to the interest taken in the questions of admitting Jews to seats in the House, and to the closing of the post offices on Sundays.

“ Without a prayer, a document will not be taken as a petition; and a paper, assuming the style of a remonstrance, will not be received.

“ The petition should be written upon parchment or paper, for a printed or lithographed petition will not be received; and at least one signature should be upon the same sheet or skin upon which the petition is written. It must be in the English language, or accompanied with a translation which the member who presents it states to be correct; it must be free from interlineations or erasures; it must be signed; it must have original signatures or marks, and not copies from the original, nor signatures of agents on behalf of others, except in case of incapacity by sickness; and it must not have letters, affidavits, or other documents annexed. The signatures must be written upon the petition itself, and not pasted upon, or otherwise transferred to it. Petitions of corporations aggregate should be under their common seal. To these rules another may be added, that if the

chairman of a public meeting signs a petition on behalf of those assembled, it is only received as the petition of the individual, and is so entered on the Journals, because the signature of one party for others cannot be recognized.

"It may be a useful caution to state, that any forgery or fraud in the preparation of petitions, or in the signatures attached, or the being privy to, or cognizant of, such forgery or fraud, will be punished as a breach of privilege. By a resolution of the House of Commons, 2d June, 1774, it was declared,

'That it is highly unwarrantable, and a breach of the privilege of this house, for any person to set the name of any other person to any petition to be presented to this house.'

And there have been frequent instances in which such irregularities have been discovered and punished by both houses."—pp. 384, 385.

We have purposely made our extracts from those portions of the work which possess an interest extended beyond the members of the legislature, and the parliamentary counsel and agents. To the latter it would be superfluous to recommend Mr. May's work; it is no more to be dispensed with in their libraries than Archbold's Common Law Practice, or Smith and Daniel's Treatises on Chancery Practice by the attorneys and solicitors. Its use, however, may be beneficially extended to all branches of the profession. There is not a professional person in any district of the United Kingdom who has not more or less to advise upon and to study proceedings on private bills; none, therefore, who do not require a manual, if not for actual practice, at least for reference, as good as from a seven years' personal use we have found Mr. May's work to be. It is ample in giving authorities for every position, and it is eminently free from conjectural statements. Promoters of private bills have ample opportunities for gaining advice and professional assistance, and avail themselves largely—may we add, most expensively—of both. The opponents of private bills are not usually so well provided in purse or in knowledge, and for their guidance we close our extracts with the regulations and practice as to petitioners being heard against an entire bill, or against its clauses.

"All the petitions against a bill which have been deposited within the time limited, stand referred to the committee; but no petitioners are entitled to be heard unless they have prayed to be heard by themselves, their counsel or agents, nor unless they have a *locus standi*, according to the rules and usage of parliament; nor unless their petition and the proceedings thereupon be otherwise in conformity with the rules and orders of the house.

"Some petitions pray to be heard against the preamble and clauses of the bill; some against certain clauses only; and others pray for the

insertion of protective clauses, or for compensation for damage which will arise under the bill. Unless the petitioners pray to be heard against the preamble, they will not be entitled to be heard, nor to cross-examine any of the witnesses of the promoters upon the general case, nor otherwise to appear in the proceedings of the committee until the preamble has been disposed of. Nor will a general prayer against the preamble entitle the petitioner to be heard against it, if his interest be merely affected by certain clauses of the bill. The proper time for urging objections to parties being heard against the preamble is when their counsel or agent first rises to put a question to a witness, or to address any observations to the committee. This is also the proper time for objecting that petitioners are not entitled to be heard on any other grounds.

"Petitioners are said to have no *locus standi* before a committee, when their property or interests are not directly and specially affected by the bill, or when, for other reasons, they are precluded from opposing it. The committee will determine, according to the circumstances of each case, whether petitioners have such an interest as to entitle them to be heard; and such circumstances will necessarily vary according to the special relations of the petitioners, and the nature and objects of the bill itself.

"It has been held generally, as a parliamentary rule, that competition does not confer a *locus standi*; but of late years this rule has been considerably relaxed, and numerous exceptions have in practice been admitted. The proprietors of an existing railway have no right to be heard upon their petition against another line, on the ground that the profits of their undertaking will be diminished. But if it be proposed to take the least portion of land belonging to the company, their *locus standi* immediately becomes unquestionable. The result of this rule has been, that most of the great parliamentary contests between railway companies have been conducted in the names of landowners. Each company have obtained the signatures of landowners to petitions against the rival scheme; have instructed counsel to appear upon them; and have defrayed all the costs of the nominal petitioners. A variation of the practice, however, has been introduced as regards competing schemes referred to the same committee; and in 1848 the rule was further relaxed in favour of the proprietors of canals or navigations. An existing water or gas company has been held to have no *locus standi* against a new company proposing to supply the same district, unless their property be taken or interfered with; but in recent cases this rule has not been enforced.

"Another important ground of objection to the *locus standi* of petitioners is, that they are shareholders or members of some corporate body by whom the bill is promoted, and that being legally bound by the acts of the majority, they are precluded from being heard as individual petitioners. This objection was argued at great length in the case of the Birmingham and Oxford Junction Railway Bill, in 1847, when the committee decided that shareholders in the company were not entitled to be heard. Again, in the London, Brighton and

South Coast Railway Bill, in 1848, determined 'that the general rule, that in the case of a joint-stock company the decision of the majority is binding on the minority, ought to be observed, and that the minority of the shareholders in this case had no *locus standi* before the committee.' In the Queensferry Passage Bill, in 1848, it was decided that individual trustees of the Queensferry Passage could not be heard against the bill promoted by the general body of the trustees. On the other hand, in the Manchester Cemetery Bill, in 1848, objection was taken to the *locus standi* of certain petitioners, being trustees and proprietors of shares in the cemetery, on the ground that they were a minority of a corporate body, in respect of interest in which body, they opposed the bill; but the committee determined that they were entitled to be heard. In 1850, the committees on the Shrewsbury and Hereford, the Shropshire Union, &c., and the Waterford and Kilkenny Railway Bills determined that dissentient shareholders could not be heard. With very few exceptions, indeed, it has been the rule, in the Commons, not to hear dissentient shareholders, unless they have any interest different from that of the general body of shareholders. In the Lords a different rule has prevailed; and shareholders who have dissented to the bill at the meeting called in pursuance of Lord Wharnccliffe's order, are expressly permitted to be heard, and have even been heard without such dissent. In the case of preference shareholders, the Commons have been obliged to depart from their usual practice. The proprietor of preference shares has a special interest often opposed to that of the general body of shareholders, and justice requires that he should not be excluded from a hearing.

"Objection may also be taken that a petition is informal, according to the rules and orders of the house applicable to petitions generally, or as specially applicable to petitions against private bills."—pp. 543—546.

It will be seen that the anomalies existing in the courts of law or equity, as well as in the ecclesiastical courts, by which parties most interested in the decision of a particular question are frequently excluded from taking part in the argument, extend to the proceedings before the makers of the laws; and though the rules of the House of Lords afford somewhat greater latitude to prevent injury to individuals, than does the practice of the Lower House, yet both Houses are lamentably deficient in affording sufficient security. If nothing else would be a bar, the enormous expenses attending the parliamentary contests would work a virtual exclusion. We shall not, probably, hear again of any leading counsel making 50,000*l.* in one session of parliament; certainly we shall not have the bar again called together to consider the pitiable case of leaders who have given credit to parliamentary agents for fees amounting to thousands, and cannot procure payment; nor shall we see again the wonderful and

almost miraculous items for law charges, which have figured in the capital accounts of the leading railways; this has passed away, and some slight remedy at a late day has been afforded, by the appointment of officers to tax the costs of proceedings in either house; yet after all, the great fact remains—law, ever an expensive luxury (county court law not excepted)—is beyond comparison expensive when private legislation is needed; few individuals who have once indulged in it will again venture upon a parliamentary contest. Private bills still partake largely of the character of judicial proceedings: they are not distinguishable in principle from judicial decrees for the redress of private wrongs; and unless a reformation take place, and the costs be largely reduced, it cannot with truth be affirmed that the spirit of the Great Charter, “*nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam*,” is acted up to.

W. D. C.

ART. IV.—NEW LAW STATUTES OF THE SESSION.

THE course of legislation upon many of the promised questions of law reform has not been rapid during the last three months, and we have but a very small instalment of new statutes to which we can refer, as affecting legal proceedings, civil or criminal. Discussions of legal topics do not seem favourites in the House of Commons. As a general proposition, all are willing to join in one object of interest—the attainment of cheap and speedy determination of legal rights, or an attack upon that *caput lupinum*, the Court of Chancery, which ever since the days of Lord Eldon has been a favourite topic for reformers. The technicalities of the superior courts of common law—the delays and costliness of a chancery suit, are subjects which come home to the hearts, and—what is more to the purpose—to the pockets of the people at large. But if members are called upon to enact some remedy for the abuses of which they complain, they find the details so distasteful or so difficult to a nonprofessional mind, that they are apt to dispose of any proposed alteration hastily, or to postpone its consideration to a more convenient season. It is proverbial, that as a class lawyers are listened to with greater impatience than any other in the House of Commons. Their motives are frequently sus-

pected, and their suggestions distrusted. We sincerely believe that in this respect they frequently do not receive justice at the hands of lay members. In the House of Lords a different course prevails. The consideration of these questions is confided almost entirely to the law lords, who are enabled to bring long experience and practical knowledge to bear on the framing of acts which are to affect the rights or liabilities of the members of the community, or to regulate the procedure of courts of justice. So far the bearings of the subject will generally be well considered. The consequence is, that it is in the Upper House that nearly all the useful law reforms of the day have originated. The consequence also is, that law reforms are delayed in their transit through the House of Commons. They are referred to a select committee, or some of their provisions materially changed, by the insertion or rejection of clauses which affect the whole scope of the bill, and return it shorn of its due proportions. Thus the session passes away; and the bill, which has been thus tossed from house to house, is hurried through its final stages at the very moment of prorogation. Some of the branches of the legal system are, to the misfortune of the suitor, and to the perplexity of the judge, in a perpetual state of transition. Scarcely has a new enactment come into operation, scarcely have the public and the courts become familiar with its details, when it is found insufficient to meet some proposed case, and new legislation immediately ensues. A strong illustration of this is afforded by the important subject of the Bankrupt Law. It is almost impossible for any person to carry in his mind the existing provisions, with a certainty of being accurate as to the course of proceeding. Even judges, it has been said by high authority, do not know the state of the law upon this subject. After all the experiments of recent years, after creating local and metropolitan courts of bankruptcy, which have certainly worked well, it has been now proposed to throw all this business, as well as many of the functions of a court of equity, upon the County Courts—those tribunals, which are at this moment so popular, that they are treated with the additional burthens of every kind of question, legal or equitable, of bankruptcy or insolvency, of law or of fact, as to which there is any complaint. It is only while we are writing, that this idea has been abandoned by its originator, from whose fertile brain most of the legislation on this point has emanated. In another session we may expect to see it revived. The County Court Extension Act, however, which is now in its progress through the House of Commons, proposes to make use of these tribunals as adjuncts to the Court of Chancery in the investigation of matters which may be referred thence to them. We

think that the county court judges have reason for their complaint, that so much additional work should be cast upon them annually without a corresponding increase of salary. We suppose the public are satisfied that all this multifarious business can be done efficiently in the time allowed by the constitution of these courts, and are content to accept a speedy termination of their disputes at the expense of some few mistakes in point of law, or in point of fact. That they are willing to accept this alteration at the present moment appears clear; but we foresee, that if this heaping up of subject upon subject is to continue, one of two effects must result—either the business will be done in a hurried and perfunctory manner, or it will be postponed from month to month, until the suitor, wearied with delay, and sick at heart from the hope of the end being so long delayed, will at length discover that the constant small attrition has worn away as much of his substance as would have been carried off at once if he had been content to abide in Westminster Hall, and he will in disgust prefer to abandon the assertion of his right, and to bear the present loss, instead of incurring indefinite future expense; or, perchance, if he is fortunate enough in the end to get any decision, he may not after all be satisfied that his case has had justice done to it. If such be the alternative, it is difficult to see who is the gainer.

These observations apply to matters of civil procedure, as to which, it is idle to suppose, that in a large and old country like England, any complete amalgamation of the functions of a court of law and a court of equity can be effected. There has of late years sprung up among our lawyers a mania in favour of American jurisprudence. A scheme, just set on foot across the Atlantic, for the entire fusion of the legal and equitable systems—albeit, scarcely tested by experience—is extolled as the highest effort of human genius. Without refusing assent to the authority of many of the United States' decisions, founded as they are upon the common law of England—without denying that American writers of the greatest learning, and American judges of the highest ability, have illustrated or enunciated doctrines of law strictly applicable to questions arising in our own courts, it may be permitted to us to doubt whether we ought, by so indiscriminate an admiration of their system, to abrogate at once institutions which have stood the test of centuries, in favour of a plan, which, however specious and attractive, must savour somewhat of crudity and novelty. We are far from saying that, because a system is of long standing, all alteration should be repudiated. On the contrary, we believe, that by no means can ancient and valuable institutions be so effectually preserved, as by modifying

them from time according to the requirements of the day. But where a system has been long established, and where it has been in the main successfully administered, its age should at least give it a title to be duly considered before it is rudely swept away. Tacitus, in speaking of a totally different subject, says, "*Hi ritus quoquo modo inducti antiquitate defenduntur.*" In like manner it may be reasonably asked, that a course of proceeding, originally applicable to a different state of society, should not be swept away, root and branch, until, at least, it has been endeavoured to render it applicable to our present wants. The presumption is, that the old system, properly adapted, will be more effectual than a new and untried scheme. On this principle, a judicious reconstruction of our own tribunals is surely a safer and wiser policy than the erection of these model judicatures. We cannot deal with judicial questions as we do with manufactures,—introduce a machine, which shall unite in one comprehensive action all the processes which were before performed singly. In legislation, especially on such subjects, there can be *vestigia nulla retrorsum*, at least, without vast inconvenience and uncertainty; therefore it behoves law reformers to introduce changes gradually, carefully to weigh their effects, and to wait to judge of their practical effect before proceeding to further and greater alteration. Such are the observations which, it appears to us, arise upon this part of the proposed legislation of the session which is now abandoned. It is to be hoped, that before these measures can be again introduced some effective plan may be promulgated for rendering more accessible and speedy the superior courts.

To the criminal law reforms, which have been of late years enacted, many of these remarks are inapplicable. In these matters there is no tendency to alter the constitution of the existing tribunals, except in a few instances, where an increased power of dealing summarily with minor offences has been given to justices of the peace. For the general criminal business of the country, it seems to be assumed, that a trial by jury in the courts of assize or quarter sessions is satisfactory, and that justice is, in the main, effected according to the mode in which the law is in this respect ordinarily administered. Indeed, we believe that all who have had any experience in criminal courts will agree, that when juries err in their verdicts it is most commonly on the side of the party accused. It is rare, indeed, that a person is convicted against the evidence; but it is by no means unfrequent, that he who is—morally speaking—clearly the perpetrator of an offence, escapes either by some defect of strict proof, or by one of those loopholes which are afforded by

a system, which, necessary as it may have been in the days when courts of criminal justice were made the vehicles of oppression and tyranny, or even before the time when the accused had a right of making his full defence by counsel, in the present day can scarcely find sound reasons for the retention of its technicalities. The current of statutes affecting criminal proceedings has, therefore, generally been directed to two objects: first, to obviate failures of justice by formal objections, which are beside the merits of the case tried; and, secondly, to provide appropriate punishments for offences which the altered state of society may have produced, and the repression of which has not been adequately secured by any law previously existing. The legislature has been employed upon both these subjects during this session of parliament; in the latter class alone has any bill as yet actually passed into a law. With a view, therefore, of carrying out our proposed intention as detailed in a former article, we shall proceed to consider the provisions and explain the working of two statutes recently passed for the purpose of supplying defects in the law, by creating and defining new classes of offences.

The first of these is the 14 Vict. c. 11, and is intituled "An Act for the better Protection of Persons under the care and control of others, as Apprentices or Servants, and to enable the Guardians and Overseers of the Poor to institute and conduct Prosecutions in certain cases." It received the royal assent on the 20th of May, 1851, from which date its provisions have been in operation. The history of this statute will best exemplify the class of cases to which it is directed. The immediate cause of its being passed was the recent occurrence of two cases where great cruelty had been practised upon young persons hired as servants from an union workhouse. The facts of these cases were probably known at the time when they occurred to most of our readers. That of the Birds, tried at Exeter, has become the subject of a serious diversity of opinion among the judges, and has been already more than once referred to in this Magazine. The other case, which led more directly to the passing of the present measure, so plainly exhibited the existing defects in the law, that we will very briefly refer to its leading features. The peculiarly revolting details of the story, as well as the position in life occupied by the Sloanes, invested the history with a fearful interest. The victim of their cruelty was a young girl, named Jane Wilbred, who had been hired by them as a servant, from the workhouse of the West London Union. Her employers were, by virtue of their contract, bound to provide her with a home, board and clothing. Unknown, friendless and

uncared for, the poor girl performed the whole of the menial offices at that strange establishment ; and, as the details which afterwards came out prove, suffered during the time that she lived with them the most dreadful privations, and underwent the most disgusting and abominable cruelties. Scarcely allowed sufficient raiment to protect her from the inclemency of the weather, forced in this state to rise at all hours of the night, in all seasons of the year ; allowed for food only the bare morsels left from the miserable meals of her employers, and forced to hide herself while she ate even this wretched pittance, scarcely sufficient to keep body and soul together ; compelled (it will scarcely be credited), and that by one of her own sex, to swallow the most disgusting and loathsome matter ; beaten on her bare shoulders by those who were bound to protect and provide for her ;—under all these inflictions it cannot be wondered at that her health failed, her body wasted away, and her mind sank into helpless imbecility. Such refinements of torture had broken her spirit and emaciated her frame. Although almost a woman in years, she was a child, or less than a child, in physical and mental capacity. Cruelty and starvation will degrade a human being almost to the level of an inferior animal, just as kindness and attention will raise a horse or a dog to a nearer approximation to man. Such was the effect of the treatment of this unfortunate creature, that when repeated suspicions had forced themselves upon the attention of the woman who had the care of the neighbouring chambers, and were communicated to a gentleman occupying rooms in the same staircase, who, with equal humanity and discretion, most promptly inquired into the circumstances, he found her lying neglected and untended in this abode of filth and cruelty, wasted almost to a skeleton, and on the verge of death from starvation. Happily and providentially he intervened in time to save ; medical aid was instantly procured, and those who were the authors of these atrocities were spared from answering for the life of a fellow-creature only to incur the universal execration of all classes, high and low, and to stand their trial for the minor offence of ill-treatment and aggravated assault. It is not our purpose to refer to the exhibition of public feeling which was manifested when Mr. Sloane appeared in the justice-room in the city, nor to the manner in which he was hunted like a wild beast through the streets and lanes as he departed. While we cannot wonder at the existence of such feelings, it is a cause for regret, that in any case a mob should be thus allowed to prejudge the guilt of an accused person, or to endeavour to inflict summary vengeance with their own hands. The law should have its course fairly and dispass-

sionately, and the public conservators of the peace should be responsible for the safety of any person brought to justice. But our present object is to show how this case was dealt with at the trial. The accused parties were arraigned at the bar of the Central Criminal Court, upon an indictment which charged them with an aggravated misdemeanor, in neglecting to provide proper food and sustenance for Jane Wilbred, "*being an infant of tender years,*" such an averment being necessary in order to affect them with the breach of duty; and also with assaulting, beating and ill-treating her, alleging the various acts of disgusting brutality before alluded to. To the part of the indictment which charged the assault and beating the prisoners pleaded guilty, thereby admitting the complete truth of all the acts alleged against them. But they pleaded not guilty to that portion which alleged a breach of duty to provide proper food and sustenance for her; and it was ruled by the learned judges before whom the case was tried, that such part of the charge could not be sustained, because, the servant not being of tender years, there was no obligation to supply her with food and raiment in respect of which her employers could be liable, except in a civil action. The offence of which these parties were guilty amounted, therefore, in law only to a common assault, for which they could be punished by fine or imprisonment, but *not with hard labour*.

It was to meet cases similar in circumstances to that just detailed, that the act 14 Vict. c. 11, has been passed. The first section provides—

"That where the master or mistress of any person shall be legally liable to provide for such person, as an apprentice or as a servant, necessary food, clothing or lodging, and shall wilfully and without lawful excuse refuse or neglect to provide the same, or where the master or mistress of any such person shall unlawfully and maliciously assault such person, whereby the life of such person shall be endangered, or the health of such person shall have been or shall be likely to be permanently injured, such master or mistress shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction for any term not exceeding three years."

This section creates two new offences. The first part of the clause renders it criminal for any master or mistress, who is under a legal liability to provide food, clothing or lodging for an apprentice or servant, wilfully to refuse or neglect to do so without lawful excuse. This provision appears to be pointed to cases where the employer, having acquired a right to the services of another, is in return bound to provide for that person; and the

law as it is now altered places such persons, who are given over to the care of others, in the same position, in regard to protection and proper treatment, as children who are physically incapable of providing for themselves by reason of their tender age. In order to appreciate the effect of this enactment, it may be well to refer to the previous state of the law as to criminal acts of nonfeasance of this character. The reason why persons placed in a position of charge towards others were responsible for their neglect arose out of the fact that the person neglected was, by tender age or other incapacity, such as lunacy, idiotcy or imbecility, unable to take care of himself, and was therefore necessarily thrown upon those who stood in the relation either of parents or protectors to him. Even where the death of a servant or apprentice was charged to have occurred by starvation or other neglect, it was necessary to show that the person starved or neglected was of such an age or in such a situation as to be unable to take care of himself. Unless this were so, the law presumed that the principle of life would be so strong in a person capable of providing for himself, that he would have taken means to prevent death; and consequently the death which actually supervened was to be attributed not to the omission of the person in charge, but to the act of the deceased himself; and the same doctrine extended to cases where death did not ensue. The question was, Is there under the circumstances any duty imposed on the prisoner? and that depended upon whether the person suffering was or was not capable of providing for himself. If a *positive act*, such as imprisonment, was charged against the prisoner, whereby another was rendered absolutely unable to provide himself with food or necessities, a duty to provide proper sustenance was immediately imposed. See *Reg. v. Pelham*, 15 Law J. Rep. (N. S.) M. C. 105; *Reg. v. Waters*, 2 Car. & Kir. 864. The present act creates such a duty in all cases where a master or mistress is legally liable, i. e. as we take it, bound by a contract, to provide food, &c. for an apprentice or servant. It in effect enlarges the private obligation into a public duty, for which the party offending is criminally responsible.

The second branch of this clause applies to unlawful and malicious assaults upon servants and apprentices, whereby their life or health is endangered or permanently injured. At common law a master is justified in moderately chastising his servant or apprentice for good cause; and such a justification would afford a defence either to an action or an indictment for the assault. If the assault were immoderate, or committed under such circumstances as showed it to be dictated by malice instead of for the purpose of correction, the master was formerly criminally

liable; but the offence amounted only to what is termed a common assault, which is punishable only by fine or imprisonment for two years, without hard labour. The present statute materially alters the character of the offence, and in both classes of delinquency provided for by the first section renders the offender guilty of a statutable misdemeanor, punishable by imprisonment, with or without hard labour, for three years.

Upon convictions for felony the party prosecuting is allowed his costs and expenses of prosecution out of the consolidated fund. The gravity of the crime renders it expedient that individuals bringing offenders of this class to light should not be discouraged by the expense incurred in so doing. As a general rule those prosecuting for misdemeanors are not allowed their costs; and although this rule has been relaxed in the more serious kinds of misdemeanors by the 7 Geo. IV. c. 64, cases of assault must, generally speaking, be prosecuted at the expense of the party affected. However, in order to give an adequate protection to the persons for whose benefit the act of this session was passed, it is provided by section 2—

“That the costs and expenses of the prosecution of any such misdemeanor as aforesaid may be allowed and ordered by the court, before which the indictment shall be tried, in like manner as the costs of the prosecution in certain cases of misdemeanor under the 7 Geo. IV. c. 64.”

We have also a set of clauses pointed to the securing of a proper treatment of parish servants—a class in whose favour some legislation was undoubtedly required. Section 3 provides that the guardians of every union or separate parish, and the overseers of every parish not in an union, or under guardians, are to keep a register of the name of every young person under the age of sixteen, who shall be *hereafter* hired or taken as a servant from the workhouse of such union or parish, together with other particulars specified in the schedule to the act, which are, the age of the child, the date of the hiring, the name of the master or mistress, the trade or other description, and also the residence of the master or mistress, which entry is to be signed by the chairman of the board of guardians or one of the overseers, thereby preserving a record of the service into which the poor child has been hired. This provision is expressly declared to be in addition to the necessity imposed upon guardians of unions and overseers of parishes not in union of keeping a register of all parish children apprenticed by them under the 42 Geo. III. c. 46, and the 7 & 8 Vict. c. 101. The latter act took away the power of apprenticing from overseers, and gave it to the guardians of unions. It is to be observed that in this and the suc-

ceeding sections the obligation upon parish officers is limited to the case of children under sixteen, that age being probably selected by analogy to other statutes, which have thrown the obligation of supporting children under that age upon their parents, or those standing to them in loco parentis, and which assume that after that period persons will generally be able to provide for and protect themselves. The first section, however, which relates to the offence of neglecting or ill-treating servants, has no such limitation in point of age.

Although, however, the register provided by section 3 affords a means of ascertaining to what service the parish child has been sent, it was considered necessary that some supervision should be exercised over such persons so long as they continued under that age when they are deemed sui juris in point of means of support and protection. Accordingly sections 4 and 5 enact—

“That where any young person under the age of sixteen shall have been or shall be hired or taken as a servant from the workhouse of any union or parish, or shall have been or shall be bound out as an apprentice by the guardians of any union, or the guardians or overseers of any parish, it shall be lawful for such guardians or overseers respectively, and they are hereby required, so long as such young person shall be under the age of sixteen, and shall be known to them to reside as servant or apprentice in the same service into which such young person shall have so gone as a servant from such workhouse, or as such apprentice, within such union or parish respectively, or within five miles of any part of such union or parish, to cause the relieving officer, or, where there is no relieving officer, then some other officer duly authorized for the purpose, to visit such young person at least twice in every year, and to report to them in writing whether he has found reason to believe that such young person is not supplied with necessary food, or is subjected to cruel or illegal treatment in any respect.

“That where any young person under the age of sixteen shall hereafter be hired or taken as a servant from the workhouse of any union or parish, or shall be bound out as an apprentice by the guardians of any union, or by the guardians or overseers of any parish, and the residence of the master or mistress shall be more than five miles from any part of such union or parish, then a written notice of such hiring, taking or binding, specifying the name and age of the apprentice or servant, and the name, description and residence of such master or mistress, shall be forthwith sent from such guardians or overseers to the guardians or overseers of the union or parish in which such master or mistress shall reside; and thereupon it shall become the duty of such last-mentioned guardians or overseers to cause the particulars contained in such notice to be registered in some book or books to be provided by them for the purpose, together with the name of the union or parish from which such notice shall have been re-

ceived; and such last-mentioned guardians or overseers shall cause such young person to be visited as frequently and in the same manner in all respects as if such young person had been hired or taken from their own workhouse, or had been bound out as an apprentice by themselves."

The concluding sections of this act have reference to the conduct of prosecutions for "offences against this act, or for any bodily injury inflicted upon any poor person under the age of sixteen years, for which the party committing it is liable to be indicted, and the circumstances of which offence amount in point of law to a felony or an attempt to commit a felony, or an assault with intent to commit a felony." In any of these cases the committing magistrates may, if they deem it necessary for the purposes of public justice that the prosecution should be conducted by the guardians of the union or overseers of the parish in which the offence is committed, bind some officer of the guardians or one of the overseers over to prosecute, who are in that case authorized to pay the costs reasonably and properly incurred by them out of the common fund of the union, or out of the funds in the hands of the overseers, as the case may be. This provision is highly useful. Since in the instances of poor children under the age of sixteen the parochial authorities are placed in loco parentis, and bound to see to their protection, it is proper that they should be the persons to institute a prosecution against those who commit violent offences against such children. But it is not reasonable that parish officers should be expected to prosecute without having an adequate security of being reimbursed the expenses which they have incurred; and it was found that this cause operated to deter boards of guardians from proceeding as actively as they otherwise would against offenders. It was deservedly a subject of reprobation, that where a friendless child was injured by those under whose care it was, that there should be even the appearance of a disinclination to prosecute on the part of the parochial authorities, or the possibility of a doubt about their being allowed to expend their funds in the reasonable and proper conduct of such a prosecution. This doubt is now expressly removed. As before seen, the costs of witnesses, &c., are to be allowed by the court, and paid by the county in prosecutions for offences as to which the provision we have just alluded to applies. But these taxed costs frequently do not cover all the expense reasonably necessary for getting up such a prosecution. Therefore the parochial authorities are properly authorized to charge the union or parish fund with the payment of all such reasonable expenses as they may have incurred beyond those allowed and paid by order of the

court trying the indictment, or of the Court of Queen's Bench, which is by section 2 expressly empowered to order and allow the costs of prosecution, in case the indictment shall have been removed into that court. This power removes a question raised in a recent case.¹

The other statute, to which we wish to call the attention of our legal readers, is the 14 & 15 Vict. c. 19, the "Act for the better Prevention of Offences." This statute is pointed to the repression and punishment of acts of criminal intention falling short of those crimes of violence which are, as felonies of a high degree, visited with proportionately severe sentences. The frequent recurrence during the last twelvemonth of open and daring acts of violence,—the fearful increase of nocturnal depredations, ending in one instance, which will be present to the memories of all, in murder,—the unrestrained audacity with which gangs of burglars lately traversed many of our counties,—all these causes combined to render necessary a more stringent power of stifling crime, especially by night, in its earliest stages, and of extending the arm of the criminal law to those acts, preliminary indeed to forcible interference with life or property, but which cannot reasonably exist except as preparatory to such complete acts of violence. The first set of provisions of this very useful act are therefore directed, as is stated in the preamble, "to the prevention of burglary and other offences in the night." To this end a new class of misdemeanors is created. The first section thus specifies these offences:—

"If any person shall be found at night armed with any dangerous or offensive weapon or instrument whatever, with intent to break or enter any dwellinghouse or other building whatsoever, and to commit any felony therein;"

Under this part of the clause it is essential that the offender should be armed in such a manner as to be capable of committing violence, and he must be found at night under such circumstances as manifest an intention of breaking into some building, and committing some felony therein. It will meet those cases where a breaking in has been begun, but not actually completed. It is material also to observe that this provision is not confined to contemplated burglaries properly so called, but extends to an intention on the part of the person so armed of breaking into and committing a felony in *any building whatever*. Burglary is an offence which can be committed only in a dwellinghouse.

¹ Reg. on the prosecution of Guardians of West London Union v. ———, 20 Law J. Rep. (N. S.) M. C. 53.

The next offence specified is—

“Or if any person shall be found by night having in his possession, without lawful excuse (the proof of which excuse shall lie on such person), any picklock key, crow, jack, bit or other implement of housebreaking;”

In this instance the mere possession of instruments usually necessary for burglary is made penal, if such possession be by night and unexplained. The presumption is not unreasonable that such implements will not be used in the night for any honest and proper purpose, and therefore it is that the proof of any lawful excuse is thrown upon the possessor. Any honest man found under such circumstances could have little difficulty in accounting for his possession of these articles. But it would throw great impediments in the way of the prevention of crime, if a person apprehending was bound to prove affirmatively that the party in possession of such instruments had no lawful excuse for his possession.

Thirdly, it is an offence—

“If any person shall be found by night having his face blackened, or otherwise disguised, with intent to commit *any felony* ;”

Upon this no observation is needed, except that, as in the previous cases, the fact of the features being disguised leads to an inference that some criminal act is meditated, the disguise being adopted to avoid detection; and also that this offence is made out, if a jury is satisfied of an intention to commit any felony whatever, whether in a building or otherwise.

Lastly, it is an offence—

“If any person shall be found at night in any dwellinghouse or other building whatsoever, with intent to commit any felony therein.”

This provision is an important extension of the law. Besides breaking *into* a dwellinghouse in the night time with intent to commit a felony therein, which is burglary at common law, it was also made burglary by the 7 & 8 Geo. IV. c. 29, s. 11, if any person should enter, either by day or night, the dwellinghouse of another with intent to commit felony, or being in such dwellinghouse should commit any felony, and in either case should break *out* of such dwellinghouse in the night time. The present act has reference to a person being by night in *any* building with a felonious intention, even though that felonious intention be not carried into effect, and even though the offender neither broke into nor broke out of the building. In all these instances the night is by section 13 defined to be the same as in cases of burglary; i. e. from nine o'clock at night until six o'clock in the morning.

But these offences, although they partake of the character of burglary, yet fall very far short of the heinousness of that crime. They are therefore all, instead of being made felonies, treated as misdemeanors, punishable in the first instance by imprisonment, with or without hard labour, for any term not exceeding three years. Should, however, a person be convicted of any of the misdemeanors above stated after a previous conviction either for felony or for any of the aforesaid misdemeanors, the court is empowered to award a sentence of transportation for not less than seven or more than ten years. A general mode of stating the previous conviction is prescribed by section 2 of this act, which also makes the certificate purporting to be signed by the clerk of the court sufficient evidence of the prior conviction. Section 9 of this act provides that the jury shall not be charged to inquire of any previous conviction under this act or the 12 Vict. c. 11 (which abolished transportation for *simple* larceny), until the prisoner shall have been found guilty of the subsequent offence, unless evidence is called to character, in which case the certificate of previous conviction may be at once put in. These provisions are similar to those at present in operation as to charging and proving previous convictions for felony. These several offences, which we have just explained, are triable at quarter sessions.

The statute next proceeds to provide for a class of cases which have latterly become of more frequent occurrence. Section 3 recites, that "whereas it is expedient to make further provision for the punishment of persons using chloroform or other stupifying things in order the better to enable them to commit felonies," and enacts,

"That if any person shall unlawfully apply or administer, or attempt to apply or administer to any other person, any chloroform, laudanum, or other stupifying or overpowering drug, matter or thing, with intent thereby to enable such offender, or any other person, to commit, or with intent to assist such offender or other person in committing any felony, every such offender shall be guilty of *felony*, and being convicted thereof, shall be liable, at the discretion of the court, to be transported for life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years."

This clause is so plain that it requires no comment. It is directed to acts preparatory to the commission of felonies, which would formerly have been treated as attempts to commit felonies; and would consequently amount only to misdemeanors. The acts above enumerated, if done for the purpose of enabling the party using the stupifying substance, or any confederate, to

commit a felony, are themselves now made substantive felonies of a graver class. They are triable only at the Assizes or Central Criminal Court.

The 4th and 5th sections relate to offences involving injuries to the person by cutting or wounding, a crime which, as indicated by the calendars of the different counties, has lamentably increased of late. Scarcely an assize passes by without the judges having to censure the cowardly and un-English use of the knife in quarrels among the lower orders of the population. To provide a remedy for attacks of this character, the 7 Will. 4 & 1 Vict. c. 85, provided that any person who should unlawfully and maliciously stab, cut, or wound any person *with intent* to maim, disfigure or disable such person, or to do some other grievous bodily harm, should be guilty of felony, and be liable to be transported for life.

Under that statute, however (which still remains in force), it is necessary to satisfy the jury of an intention existing in the mind of the prisoner to inflict an injury of one of the three classes there specified. Frequently, therefore, where the parties concerned had been engaged in a half-drunken squabble in a pot-house—that fruitful nursery of all crime—it was difficult to make out any such intention as was charged in the indictment, and the prisoner was only convicted of a common assault. It is plain, however, that an outrage of this class, although it did not amount to the statutable felony, was one deserving of more exemplary punishment than a mere common assault. Accordingly, the present act (14 & 15 Vict. c. 19) by its 4th section recites, “that it is expedient to make further provision for the punishment of *aggravated* assaults,” and enacts,

“That if any person shall unlawfully and maliciously inflict upon any other person, either with or without any weapon or instrument, any grievous bodily harm, or unlawfully and maliciously cut, stab or wound any other person, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned, with or without hard labour, for any term not exceeding three years.”

By a proviso added to this clause in the House of Commons the offence thereby created is expressly made cumulative upon that enacted by 10 Geo. IV. c. 34, s. 29, which provides, that if any person shall unlawfully and maliciously assault, beat or wound any person, *so as thereby to endanger the life of such person*, he shall be liable to be transported for seven years, or to be imprisoned, with or without hard labour, for three years.

The present clause is directed to a distinct class of injuries which are not necessarily so likely to be productive of fatal results.

It was originally proposed to give a legislative definition of the term "wound," in criminal phraseology; so far as to make it "include any injury to the body, whereby the skin should be divided, or whereby any person should be maimed, or disfigured, or disabled, or suffer any other grievous bodily harm, whether such injury should have been inflicted with or without any weapon or instrument;" but this clause was struck out in the further progress of the bill.

In order to meet any unexpected turn which the evidence may take, or any conclusion which the jury may draw in cases of personal violence, by negativing a felonious intention, it is further provided, by section 5, that

"If upon the trial of any indictment for any felony (except murder or manslaughter), where the indictment shall allege that the defendant did cut, stab or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing or wounding, charged in the indictment, but are not satisfied that the defendant is guilty of the felony charged in such indictment, then and in every such case the jury may acquit the defendant of such felony, and find him guilty of unlawfully cutting, stabbing or wounding; and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for the misdemeanor of cutting, stabbing and wounding."

This will, we have no doubt, be found to be a very useful clause in criminal proceedings; and is applicable not only to the statutable felonies of cutting and wounding, but to *all felonies* whatever (except such as result in death) where the indictment alleges, as a constituent part of the charge, a cutting, stabbing or wounding. Highway robbery with violence, burglary with violence, and all other felonies accompanied with external injuries falling within any of the categories above-named, will be affected by it. But especial care must now be taken that the indictment *alleges* a cutting, stabbing or wounding as part of the offence charged.

The only other kind of crime newly created by this act has reference to the protection of persons travelling upon railways. When the improvements of art have raised new conditions of life among us, acts which were before nearly innocuous, frequently become fraught with the greatest danger. While our ancestors travelled in coaches along turnpike roads, they were exposed to attacks of a character which has now ceased with the increase of population and the greater cultivation of land. But, on the other hand, they never dreamed of injuries of the

gravest nature, which may now be inflicted upon travellers by causes apparently the most trifling. A railway train, loaded with hundreds of human beings, may be suddenly thrown out of its course, and a vast sacrifice of life, limb and property produced by the wanton mischief of a thoughtless boy, or by the deliberate malice of a miscreant. The system of supervision and arrangement exercised by railway companies is generally admirable. Where any neglect or carelessness occurs on the part of their officials, it is thoroughly investigated and adequately punished. But in proportion as any system is complete, so any slight derangement of its parts is productive of more serious injury. It is impossible for any line of railway to be so watched in all its parts as to prevent the possibility of an obstruction being laid on the rails sufficient to overturn a train, or of a signal being falsely exhibited, by which a collision may ensue. The consequences of such acts are so fearful, and so difficult of prevention, that the aid of the legislature is required to deter men from their commission, by awarding a punishment sufficient to prevent the occurrence of such offences. It had, indeed, previously been enacted, by the 3 & 4 Vict. c. 97, s. 15, that it should be a misdemeanor, punishable by imprisonment for two years, with or without hard labour, if any person should "wilfully do or cause to be done, any thing in such manner as to obstruct any engine or carriage using any railway, or to endanger the safety of persons conveyed in or upon the same, or should aid and assist therein." But a more stringent penalty was required, as well as a more complete enunciation of the acts constituting the offence. Accordingly, by different sections of this act, it is provided, that

"If any person shall wilfully and maliciously put, place, cast or throw upon or across any railway, any wood, stone, or other matter or thing, or shall wilfully and maliciously take up, remove or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall wilfully and maliciously turn, move or divert any points or other machinery belonging to any railway, or shall wilfully and maliciously make or show, hide or remove any signal or light upon or near to any railway, or shall wilfully and maliciously do or cause to be done any other matter or thing, with intent in any of the cases aforesaid to obstruct, upset, overthrow, injure or destroy any engine, tender, carriage or truck, using such railway, or to endanger the safety of any person travelling or being upon such railway, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his natural life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years.

“ If any person shall wilfully and maliciously cast, throw, or cause to fall or strike against, into or upon any engine, tender, carriage or truck, used upon any railway, any wood, stone, or other matter or thing, with intent to endanger the safety of any person being in or upon such engine, tender, carriage or truck, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his natural life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years.

“ If any person shall wilfully and maliciously set fire to any station, engine house, warehouse or other building, belonging or appertaining to any railway, dock, canal, or other navigation, every such person shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his natural life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years; and if any person shall wilfully and maliciously set fire to any goods or chattels, being in any building, the setting fire to which is made felony by this or any other act of parliament, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas, for any term not exceeding ten years, nor less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years.”

There now only remain some general provisions applicable to all the offences created by this act. The object of this act is the prevention of offences; and the different misdemeanors and felonies therein specified consist of acts such as, if not immediately prevented, would almost inevitably result in the commission of offences of greater magnitude. In such cases therefore it is very essential that any private individual should be armed with sufficient authority at once to detain any such offender without waiting until a peace officer can be summoned. Delay in such instances would at least facilitate the escape of the culprit; accordingly sect. 10 provides that

“ It shall be lawful for *any person whatsoever* to apprehend any person who shall be found committing any offence against the provisions of this act, and to convey him, or deliver him to some constable or other peace officer in order to his being conveyed, as soon as conveniently may be, before a justice of the peace, to be dealt with according to law.”

A similar provision is extended by sect. 11 to *all* indictable offences committed in the night, as to which it states that doubts had been entertained as to the authority to apprehend. For remedy thereof it is enacted,

“ That it shall be lawful for any person whatsoever to apprehend

any person who shall be found committing an indictable offence in the night, and to convey him, or deliver him to some constable or other peace officer in order to his being conveyed, as soon as conveniently may be, before a justice of peace, to be dealt with according to law."

These two sections invest private persons in the cases specified with all the authority of constables or other peace officers. In order to give them an adequate protection from violence, while exercising this power, a clause is added to the effect that,

"If any person liable to be apprehended under the provisions of this act shall assault or offer any violence to any person by law authorized to apprehend or detain him, or to any person acting in his aid and assistance, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned, with or without hard labour, for any term not exceeding three years."

This clause provides an increase of punishment in cases where the person, who is himself liable to be apprehended under the provisions of this act, assaults the party authorized to apprehend him; but it gives no protection against the violence of others, who may attempt to rescue the principal offender. Such an interference by a third person is nevertheless punishable, under a former act of 9 Geo. IV. c. 31, s. 25, which renders an assault with intent to prevent the lawful apprehension or detainer of any other person for any offence for which he may be liable to be apprehended or detained, a misdemeanor punishable with two years hard labour. Of course wherever a private person is empowered by this act to apprehend or detain, he will be protected by the former statute. Independently of the authority given by this act, the party interfering to detain the offender could have only complained of a common assault.

Lastly, section 14 provides that

"In all prosecutions for any offence against the provisions of this act, it shall be lawful for the court, before which any such offence shall be prosecuted or tried, to allow the expenses of the prosecution in all respects as in cases of felony."

We have now gone through the various parts of this statute, with such comments as will be, we trust, serviceable to our readers. That such enactments were much needed we cannot doubt. That the provisions here made will be found useful in practice, admit we think of no less doubt. We congratulate the country upon this as a very desirable step in criminal legislation, whereby a proportionate scale of punishment is awarded to offences differing in substance little from those which were always punishable with much severity, the only distinction being that they fall short of

the more aggravating circumstances, which impressed a character of greater criminality upon the former offences. It is much to be wished that in all cases where an offence of a higher nature is charged, and an offence of precisely the same nature is proved in evidence, but unaccompanied with the incidents which give it the greater degree of criminality, juries should be at liberty to convict, and judges should be at liberty to punish, for the offence actually proved to have been committed. This object, amongst others equally valuable, is effected by Lord Campbell's Bill for the Improvement of the Administration of Criminal Justice, which we cannot but regret should not have received the royal assent previous to the commencement of the Assizes in this Summer. We look forward, however, to being able to lay its provisions before our readers, together with those of other legal reforms, in our next number.

Whilst this article was passing through the press, our attention has been directed to the decision of the committee of the House of Commons on the County Courts Extension Bill, upon the clause regulating the practice of advocates in those courts.

We hope that this clause may still undergo reconsideration in another place, and that it will be there debated as a question of policy involving the due administration of justice, and not viewed merely as it may affect two branches of the profession, whose interests, for the first time, are brought into conflict, and whose functions have hitherto been kept distinct.

We regret that the Attorney and Solicitor-General should have allowed the question of advocacy to be discussed, as if the interests of the bar only were at stake. If that were all, we agree the bar are entitled to no monopoly, but that, like all other classes, they must submit in patience to the changes which times and circumstances have produced. But if the administration of justice is an affair of state, in which the government of the country are bound to interfere, if it is of consequence that judges should be capable of discharging their duties, and that courts should be worthy the confidence of the suitor, then it is essential to such ends that the advocates, as a body, should be learned and honest, and governed by a spirit which will prevent the knave and the charlatan from ultimately succeeding, and be able to control an ignorant, or an unjust, or an intemperate judge.

This is effected, to a great extent at present, by the many men of high education and honourable position who are little engaged in actual practice, and by others who wait in patient

expectation till their turn arrives. Their high feeling gives a tone to the profession, which is a check upon those whom necessity or bad education might incline to what is disreputable. The position of an advocate is one of trust and confidence. He must have great privileges and great freedom of action, or his utility is impaired. He must fear no one,—neither judge, nor adversary, nor employer. But he must fear to do wrong, and be a law to himself, and govern his conduct by the rules of uprightness and honesty.

It was proposed as an amendment to the original clause, that in cases above a certain amount, the party might appear either by himself in person, or by the attorney who had the conduct of the cause, or by a barrister. This appeared liberal enough; but the House decided that he might also employ an advocate who should be neither barrister nor the attorney in the cause. This introduces a new class of advocates, who cannot fail to deteriorate the other two, and to lower the character of the courts by lowering the quality of the practitioners. It is a great mistake to suppose that the cost of advocacy is the great item of charge, or that the cost would be diminished by allowing the same person to act in the two characters of attorney and advocate. But, in truth, it is not as a question of money cost to the parties concerned that the subject should be considered, but as part of the system of administering justice. The judge must not only be independent in position and learned in attainments, but he must be assisted by men of like character, upon whom he can rely, to whom he feels he is responsible, and whose confidence in him strengthens his reliance on them. Such a system can never be constructed, if the beginning and end of the inquiry is how cheap it can be done. These new tribunals, which are the idol of the present day, must, now that their jurisdiction is extended, be made worthy of the powers with which they are intrusted, or they will become the fruitful source of oppression and wrong.

H.

ART. V.—THE ROYAL UNIVERSITY COMMISSION.¹

WE have heard considerable astonishment, much more than seemed at all due to the occasion, expressed at the diversity of the very eminent legal opinions which have been taken by different parties upon the legality of the Royal Commission to inquire into the state, discipline, studies and revenues of the Universities and Colleges of Oxford; and we have even heard it referred to as an instance of judgment being swayed by feeling, parallel to that in the celebrated writ of error in O'Connell's case. But there the judgment, which was thus warped, was a judicial judgment; the present case is at the most only an instance of that bias which an advocate almost invariably feels in favour of the side on whose behalf he is advising—the feeling which every sailor has for the ship he may happen to swim in. Even the Delphian god Philippiized, when Philip held his temple; a trait which some may sneeringly assent to as presenting a readier clue to explain the lawyer's propensity above mentioned.

The diversity of opinion on the present case, however, is somewhat remarkable, as, although the opinions were of advocates merely, they were taken in the quasi judicial form of a case; and a case of great importance and solemnity, and in which the facts are extremely simple, and admitted on all sides; and the leading cases and authorities are also all admitted and accepted by the parties.

Under these circumstances the first and only question appears to be, whether the present Commission is or is not essentially the same as former Commissions, which have been condemned as illegal. The advisers of the University of Oxford² allege that any differences, which may be observed in the terms of the pre-

¹ Gazette, 3rd September, 1850, Whitehall, 31st August, 1850. "The queen has been graciously pleased to appoint the Right Reverend Dr. Hinds, Bishop of Norwich; the Very Reverend Dr. Tait, Dean of Carlisle; the Rev. Dr. Jeune, Master of Pembroke College; J. L. Dampier, Esq., Vice-Warden of the Stanary Court, Cornwall; the Rev. Baden Powell, Savilian Professor of Geometry; and the Rev. G. H. S. Johnson, to be her Majesty's Commissioners for inquiring into the state, discipline, studies and revenues of the University and Colleges of Oxford." The Commissioners appointed by the same Gazette for similar purposes as to the University and Colleges of Cambridge are the Bishop of Chester, Dr. Peacock, Dean of Ely, Sir F. W. Herschell, the present Master of the Rolls, and Dr. Sedgwick, Woodwardian Professor of Geology.

² Sir G. J. Turner, Messrs. Bethell, Keating and Bramwell. See the whole case and opinion on behalf of the University of Oxford in the Morning Herald, 14th March, 1850.

sent Commission to distinguish it from former Commissions, now admitted to have been illegal, are not such as to save the legality of the present inquiry. They allege that former Commissions have been condemned, notwithstanding the utility of the objects they professed to have in view, on account of the want of original authority in their constitution, and of the dangerous encroachments to which they might lead. The same want of original authority,—the same reasonable apprehensions of possible encroachments grounded on this suspicious precedent, it is urged, necessarily lead to the same conclusion in the present case, without paying any attention to the professed objects of inquiry, or the importance or utility of obtaining the information said to be wanted. The crown lawyers, on the other hand,¹ appear to invert this order of considerations; and instead of estimating solely the legality or illegality of the Commission irrespective of its professed ends, they seem to take the utility and the harmless nature of the inquiry as reasons for withdrawing it from the ban placed on so many similar Commissions, whether acted under or not. The decision of the gentlemen consulted by the University of Oxford, in a word, seems to examine and state what in their opinion the law is; that of the crown lawyers seems rather to examine and state what in their opinion the law ought to be. And on the dry question of legality or illegality, we confess that we think Mr. Bethell is right, “that the Commission is not constitutional nor legal, or such as the university and its members are bound to obey; and that it cannot be supported by any authority of the crown either as visitor, or under any other authority or right.”

Not as visitor; for whatever might, under the statutes of Henry VIII. and Elizabeth, which vested all ultimate ecclesiastical authority in the sovereign, be the claims of the crown to succeed to the visitatorial rights formerly exercised by the Bishop of Lincoln as diocesan, by the Archbishop of Canterbury as metropolitan, or by the Pope or his legates, whether *a latere* or *nati*, these rights only existed while the universities were ecclesiastical corporations. Their ecclesiastical character constituted the only *locus standi* for those rights. And at whatever period it was that the change took place, it is certain that the universities have now for a long time been lay corporations.² No authority therefore can be derived from this source, and it becomes unnecessary to examine into the extent of the visitatorial power formerly exercised by these ecclesiastical persons, or how far it was vested

¹ Sir J. Dodson (Advocate-General), Sir A. Cockburn and Sir W. P. Wood. See their opinion in the *Times*, 6th May, 1850.

² University of Cambridge's case, 3 Burrows, 1647; E. T. 5 Geo. III.

in the crown by the prerogative-riveting statutes of the Tudors.¹

Neither has the crown any visitatorial authority derived from any other source which it can exercise in this manner. It is true, that in 1647, when the parliament issued a Commission to examine into the state and affairs of the Universities (concerning the informality of which there can be no question), the University of Oxford, in refusing submission, alleged, that by ancient prescription and privilege the crown alone was authorized to institute such inquiries, and that to the crown alone were they answerable for their conduct as a University. It was this allegation which gave rise to Prynne's tract, quoted in the last note, in which he proves that the usage had not been as asserted by the University. The plea seems somewhat inconsistent with the present conduct of the University; but, probably, it would be explained that it is the mode in which the present inquiry is appointed to be made, viz., by a Commission under the Great Seal, which is exciting their opposition, and not any undutiful repugnance to the authority of the crown. And it would probably be said, that whoever is visitor, he must exercise his authority in the way of the common law;² viz., when called upon, and when a wrong is brought before him, by one party complaining against another. To this it may be replied, that if the functions of a visitor be confined to this, there does not seem to be any authority which can spontaneously examine into the state of a public corporation, e. g. of either University, lower than an act of parliament; and this is probably the view (although not so stated) of the advisers of the University.

Has, then, the crown any authority to issue under the Great Seal or Sign Manual a Commission of this description, not as visitor, or as claiming to exercise any visitatorial functions, but as part of the general authority and prerogative of the sovereign? The answer to this does not appear so ready as to the first question. The crown has of course an undoubted right *prima facie* to issue Commissions; but the legality of any particular Commission will depend on the objects and mode of

¹ There is a learned history of divers of these visitations in Prynne's tracts, No. 70, "The Plea of the University of Oxford Confuted." Prynne's arguments are often distorted and partial; his statements of facts and references are tolerably accurate. The view above stated seems fully justified by the reasons alleged in Sir Anthony Roper's case, 12 Co. 45, as to the authority placed in the hands of the crown by the above statutes.

² "A private charity" (or an eleemosynary foundation) is the creature of the founder, and governed by his private laws; but other corporations are governed by the common law. 2 Str. 912, Dr. Bentley's case. Sir James Scarlett's opinion on the Corporation Commission, Ann. Reg. 1833. Sir Rob. H. Inglis's Speech, Parl. Deb. 18th July, 1850.

inquiry proposed, and the powers assumed to be given to the Commissioners, so that the prerogative of the sovereign will not avail much to defend the Commission, which must stand or fall on its own merits. Many Commissions have issued under similar authority, with various powers—to hear and determine of offences; to assess taxes; to examine witnesses on oath; to fine and imprison recusants. Many of these Commissions have been submitted to, many have been withstood, many have been condemned in a court of law. But there does not seem to be any precedent in which the legality of a Commission, precisely similar to the present, has been judicially examined. We are, therefore, thrown upon what Paley calls the contest of opposite analogies. *Prima facie* the Commission is legal, unless we can show, that either in the mode of inquiry, or the objects proposed, or the powers given to the Commissioners, it is infected with some vice already judicially designated as fatal to its validity. The mode of inquiry being without oath, and merely voluntary, is of course harmless. There is more doubt as to whether the objects of the inquiry are such as come properly within the scope of such a Commission. But on the third point, as to the powers reserved to the Commissioners, we cannot but think (although, as we admit, unwillingly) that they are such as to render the Commission illegal. Of course, such an excess of authority was wholly unintentional on the part of the government; it will appear to some persons a mere cavil, to be immaterial, even if it be more than a mere quibble on words: it is not the less, in our opinion, fatal to the legality of the Commission.

It is sought to defend the objects of the Commission, by alleging that they do not extend to the determining of any right, but only to inquiry. Neither is the inquiry concerning offences contrary to law; but merely as to certain practices, and for the investigation and discovery of those particulars connected with the government of the University, which, it is alleged, are not generally or accurately known. The resolutions in Lord Coke's Reports (12 Co. 31, "Commissions of Inquiry") are usually appealed to by those who support, and also by those who reject as insufficient, this line of defence. In that case, certain Commissions had been issued under the Great Seal, directed to divers Commissioners within Bedfordshire and sundry other counties, to inquire of depopulation of houses, converting arable into pasture, &c.¹ And the Commissioners were not to

¹ The very same circumstances would, according to some parties, seem at the present day to call for inquiry into the same matters in the Highlands of Scotland, where the extensive multiplication of sheepwalks and deportation of inhabitants has often been alleged against the landlords. However, that which three centuries ago was deemed a fit subject for a Royal Commission as an offence, is now considered a mere agricultural improvement.

have power to hear and determine the said "offences," but only to inquire of them. And it was unanimously determined by the two chiefs and all the justices of the Courts of King's Bench and Common Pleas that the said Commissions were against law, for three causes; two of which, viz., that the Commissions were in the English language, and that the subjects of inquiry were stated, not in the body of the Commission, but in an appended schedule, do not apply in the present case. But the third reason seems to extend to the present Commission, viz.—

"3. For this, that is only to inquire, which is against law, for by this a man may be unjustly accused by perjury, and he shall not have any remedy."

(Inasmuch as the perjury, or rather false witness, not taking place upon any judicial proceeding, would not, technically speaking, be perjury, or punishable as such.)

"Also the party may be defamed, and shall not have any traverse to it."

And these expressions, which certainly are applicable to the present Commission, would seem to involve it in the same condemnation as these Bedfordshire Commissions; were it not for the language of Lord Coke's immediately following our last quotation:

"Such a Commission may be only to inquire of treason, felony committed), &c. And no such Commission ever was seen to inquire only (i. e. of crimes)."

So that it would seem that the present Commission, not professing to inquire concerning any offence, but only into matters *per se* indifferent, is by Lord Coke himself excepted from the imputation of being against law. And, accordingly, when Sir George Turner and the other gentlemen consulted by the University of Oxford, quote this case as expressly condemning a Commission "only to inquire," the law advisers of the crown triumphantly proceed with the quotation, and producing and insisting upon the words which Lord Coke adds in a parenthesis (i. e. of "crimes") seem to upset the whole of their adversaries' argument based on this case—in fact, to capture their guns, and turn their own fire upon them. It has, curiously enough, never been noticed by either party, that the whole of the latter passage at any rate is manifestly corrupt.

The two clauses of the sentence are quite contradictory. Are "treason" and "felony" not "crimes?" How can it be said that there may be a commission "only to inquire" of treason

and felony committed; and in the next breath, that "no such Commission ever was seen to inquire only, i. e. of crimes?"

There is a "various reading," which suggests the words "treasure trove," "felons' goods," in lieu of "treason" and "felony committed." It is easy to see how the corruption arose, if we suppose Lord Coke wrote (when abbreviations were much more frequent even in print than at present) "treas:" "felon:" instead of the words at full length. If we retain the present reading, we render the whole passage of no authority, since it is plainly nonsensical. If we accept the alteration, the saving makes the whole judgment still more favourable to the view taken by the crown lawyers; since it seems to draw a distinction between Commissions appointed to examine into offences, and those to examine into rights of property, in favour of the latter. Yet it must be noticed, that the excepted instances (if we accede to the proposed alteration) are instances where the right of property is in question, but of property in which the crown claims or may claim an interest; and an admission by Lord Coke, that the crown may issue a Commission of mere inquiry, upon a subject in which it may claim a right of property, must not be relied upon to support a Commission of mere inquiry into a subject in which the crown can claim no right of property whatever. And in the next place, it must not be too lightly conceded, that the subject-matters for inquiry by the present Commission are matters only relating to property. They relate not only to property and the rights thereto, but also to the "state, discipline and studies" of the universities—the conduct of their members,—and the mode in which those rights of property have been regarded and exercised. And though the right of property cannot be the subject of criminal courts (except under the fictitious invention of trespass), the mode in which such a right has been acted upon may very easily give rise to criminal procedure. And the subjects of inquiry go even beyond this: they are expressed to be the "state, discipline, studies and revenues" of the University. Criminal questions may evidently be involved in the consideration of the state and discipline of the University, which would clearly prevent the present Commission from being by any means brought within the limits of Lord Coke's *exsequatur*. And, to recur to the previous reasons assigned in the same case, it is clear that the reasons alleged, as to the danger of perjury and defamation, without any remedy to the party injured, are just as strong against this Commission as against the Bedfordshire Commission, which Lord Coke condemns. It is another and equally strong argument against it, that by it a man may in self-

defence, and to rebut the loose and irresponsible allegations of voluntary profferers of "evidence," be compelled to answer contrary to the law of the land; or as it is well and forcibly put by the advisers of the University of Oxford, "the rights, franchises and property of the University, and the conduct of its members, are brought in question, not in regular course of law, but without any accusation being stated, or any accuser appearing—without any power to adjudicate, or any means of correcting error or of appealing from injustice. Such Commissions," they proceed to affirm, "have been repeatedly condemned, both in courts of law and in parliament."

But the case is much stronger when we consider the special powers with which the Commissioners are armed. The Commission purports to authorize and empower them "to call before them such persons as they shall deem necessary, and also to call for and examine all such books, documents, papers, and records as they shall judge likely to afford them the fullest information. This is an assumption of authority, controlling the actions and interfering with the property of the subject in a manner which the law of England does not allow to the Royal Prerogative. Nor can the imperative and binding nature of the authorization, thus purported to be given, be diminished or brought within lawful limits by the absence of any penalty imposed on disobedience, or any additional powers in the hands of the Commissioners to fine and imprison, for which precedents from former days would not be wanting. The addition of such arbitrary powers would clearly show an intention to strain the prerogative: their absence only shows the absence of an intention so to strain it. But even without any such express and manifest transgression of constitutional limits, a royal authority to control the actions of individuals, whether by summoning them to give evidence, or in any other manner, is in itself an assumption which cannot be indifferent in its character. It must either be binding upon the subject; or else it is an illegal assumption on the part of the crown. Where the prerogative on the one hand, and the liberties of the subject on the other, are so jealously guarded and so easily ascertained, any transgression, however futile, is a transgression still; more or less trifling or important, but always an illegal act. It has been argued that this is an inquiry which any private person may make himself, or may direct others to make: the "Times" has its Commissioners—shall the Queen not have her's? Is the crown then less at liberty than any private person in the state?—The answer is undoubtedly, Yes, in many instances: not, in this alone. The power and reverence centred in the monarch are

such, that there can be no equal terms between her and any subject, as there may be between two subjects. Thus Lord Coke, in the case of Prohibitions, by his boldness in which so much of his greatness has been won,¹ instances that "the king cannot arrest any man, as the book is in 1 Hen. VII. 4, for the party cannot have remedy against the king; so if the king give any judgment, what remedy can the party have? And Markham, C. J., told Edward IV. that the king cannot arrest a man for suspicion of treason as others of his lieges may;" for a similar reason. And although² "the king cannot by his proclamation create that an offence which was not an offence before, yet he may prohibit them before; which will aggravate the offence, if it be afterwards committed," scil. so as to be punishable by additional fine and imprisonment. A Commission of the description now under consideration comes very near to the case of a proclamation; which claims the obedience of the subject in all lawful things, and renders them liable to enhanced penalties in case of refusal. This Commission, therefore, attempts to subject innocent persons to enhanced penalties in case they refuse to expose their conduct to reprehension, or their property to hazard, by discovery of title, &c.; which must be, and is, illegal.

It appears, therefore, that the advisers of the crown are making an erroneous statement when they say, "This is merely a Commission issued by the crown for the purpose of obtaining information on a matter of public concern, without the assumption of compulsory powers." There is a quasi-compulsory power, a power which challenges compliance and obedience, inherent in every such instrument; to disobey which, if the command be lawful, is criminally punishable; and therefore to promulgate which, if the matters commanded are or may infer harm to the subject otherwise than according to the established law (as in the present case), is in itself unlawful.

Leaving the barren point of dry abstract legality however, and coming to the consideration of the general question, it may seem somewhat singular, after what we have said, to state that in our opinion the lawfulness of the Commission is of very little interest. The discussion involves a question of black-letter and somewhat musty investigation, proper enough for the antiquarian, and extremely useful to the historian; but it is singularly sterile of any results practically useful to the cham-

¹ With which the king was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said, to which I said, that Bracton saith, *quod Rex non debet esse sub homine sed sub Deo et lege*. 12 Co. 65.

² 12 Co. 75, 76.

pions ranged upon either side in the battle of University Reform. And while we highly esteem the opinion of Sir George Turner and Mr. Bethell on the dry point of legality aforesaid, we can hardly appreciate the excellence of the practical line of conduct they advise the University of Oxford to pursue, viz.—

“To petition the Queen in council, stating the loyal wish expressed in the case” (upon which the opinion was given), “the nature of the advice they have received, and the dangers they apprehend from the Commission; and praying that her Majesty may be graciously pleased to withdraw and cancel this Commission, or else that it may be reconsidered by her Majesty in council, and that in that case the University may be heard by counsel against it.”

Having little hesitation in coming to a conclusion against the lawfulness of the Commission, we have as little doubt that the learned member for Aylesbury, if the opportunity pointed out in the above opinion were afforded him, could and would make a triumphant protest and a brilliant manifesto on the topic of the liberties of the subject and the prerogative of the crown. We almost regret the extreme improbability of obtaining the results which his unequalled powers of argumentative oratory could not fail, under such circumstances, to afford; and which doubtless would furnish as valuable a collection of the law and history of the Universities and of Royal Commissions, as the Hampden controversy has furnished on the nature of a *congé d'élire*. But what is the practical value of such advice? We do not know how far the University may, under the opinion in question, abstain from any communication with the Commissioners. Sullen silence, be it observed, their advisers have not recommended; and it would evidently be highly disrespectful to the authority from whence the Commission issues. They ought either to answer, or, as they are advised to do, take steps for cancelling the Commission altogether. But let them not dream of maintaining their present inaccessible position by any such puny devices as those counselled in the opinion. The community have both the immediate and the ulterior objects of the Commission thoroughly at heart; and if it were to appear probable that these objects were likely to be defeated by any general or concerted refusal to give information—that the University previously intended to evade the wishes of the public, by what would in very many quarters be termed absurd black-letter quibblings and crotchets—long before they could instruct counsel to argue against the existing Commission before her Majesty in council, before even the petition recommended in the above cited opinion could be presented, an act of Parliament would if necessary be passed, under which far more strin-

gent powers might be given to far more stern and uncompromising judges. Inquiry is wanted, and inquiry must be had : information is desired, public, authentic and accessible, and that information must be given. To the present Commission or to some other, this year or the next, by fair means or foul, the whole "state, discipline, studies and revenues" of the Universities must be discovered and laid bare. We think that it would seriously affect the benefits to be expected from such an inquiry, if it were to be conducted by any persons who were even suspected of hostile intentions by the Universities themselves. The information also is likely to be much more full, more free, unreserved and general, if tendered voluntarily and without the formality of an oath, it being always in the discretion of the Commissioners to receive or decline any evidence which may be proffered. Indeed we are of opinion, that any compulsory investigation would be productive of infinitely more evil than good ; and we should therefore see with extreme pain the present inquiry fail of effect.

There are apparently only three events one of which can be true. Either the whole system of the University must be swept away, and another constitution *octroyée*, according to the revolutionary jargon of the day : in which case, inquiry of some description would certainly seem to be requisite before promulgating the new constitution, whatever it be, that our radical educational reformers may have in their heads, or their bonnets. Or secondly, the present University system may be on the whole useful and proper to be retained, but with various alterations in the terms upon which it confers the benefits of education ; with enlarged scope and modified requirements (e. g. as to residence and religious tests) for some of the honours and rewards in the disposal of the University, some of which alterations and modifications may, and others may not, be beyond the power of the Universities themselves to effect. It is evident that in this case inquiry is as necessary as ever : we must ascertain what should be retained, what rejected, how the rejected portion is to be replaced, and what new powers or authorities are to be added, where those already existing are deficient. Or there is, lastly, the third hypothesis, that the Universities at the present time are, as some allege, beyond reproach and beyond amendment, save what they themselves can effect by their own authority : and therefore that the present system is to be continued without any variation. Even in this case inquiry is necessary ; for it is imperatively demanded by that public opinion, which no individual or corporation can at the present day browbeat or evade. Many an innocent man has been put on his trial before now : generally

indeed innocent persons, falling into circumstances of suspicion, loudly demand it. The Universities may be wholly unimpeachable: but they are so loudly accused that it is in vain for them to refuse to bring forward proofs of their merit, and of the injustice of the accusations. The schoolmaster has been too long abroad for the public to be much impressed with Latin Grammar quotations about *murus aheneus* and a *mens sibi conscia recti*. Unceremonious misbelievers will be found to answer that the brass is readily to be found in the foreheads of those who refuse to explain themselves and their conduct, and that the *mens sibi conscia recti* may be usually translated "a perfectly self-satisfied man." They refuse to accept the reason alleged for not giving accounts or explanations, viz. that the individual called upon is persuaded of his own impeccability. It is precisely such a man who is not likely even to call himself to any account: and if he do vouchsafe any statement or explanations, there is no guarantee whatever that a very different result may not appear where a more unprejudiced mind is brought to the investigation.

The Universities, it is said, are suspicious, and have ground for more than suspicions, of the intentions of the party which summons them to this examination,—a sect of virulent partisans, who, in and out of parliament, seem pledged to carry on an incessant and uncompromising guerilla warfare with every individual and institution connected with our Church. We should be very sorry to make common cause with these. But we think that the Universities are seeking to maintain an indefensible position. They are expending time, talents and opportunity, upon objects from which they are certain ultimately to be driven with loss, but which they may now abandon with very great profit. It is not surely identifying ourselves with such partisans, to warn the Universities of (in our view) the real situation of affairs. And, it may be asked, do the Universities themselves give no ground for suspicions of their intentions? All must admit, and feel great pleasure in so doing, the very great extension in the scope of studies pursued at the Universities, especially at Cambridge; giving them at length some right to higher designation than that of mere grammar schools. But what is the language of the University of Oxford, in the case submitted to counsel as above stated?—language carefully weighed, evidently, and probably representing with accuracy the general feeling of the University, or her speaking head:—

"They, i. e. the University, wish to show every deference and respect to the crown, but they are told that if they submit to the present Commission, they may not only compromise the rights and privileges which have been enjoyed by the University from time im-

memorial, or been granted by the crown and confirmed by parliament, but they will virtually expose the University to attacks and commissions, at the will of the minister of the crown for the time being, to the great disquiet if not ruin of the University, and that it is therefore their duty not to submit to the Commission."

Do the University seriously fear what they "are told," that a voluntary proffer of information to any person, Commissioner or not, is likely to compromise immemorial rights, or to affect privileges expressly granted by the crown and confirmed by parliament? Is the fear reasonable? Again, why can the University conceive no Commissions which are not in the nature of "attacks?" If they were wise and humble, as they are sometimes accused of being arrogant and short-sighted, they would hail this present Commission as really being very nearly the remedy most proper to restore them to the position which they ought to occupy; and which, notwithstanding, or perhaps we might better say in consequence of, the very excellent opinion they have of themselves, we must beg leave to assure them they very much fall short of. The contrast of Oxford, with her 30,000 students of the middle ages, and Oxford with 1600 in the nineteenth century,¹ when riches, the rewards of learning, when the population to be taught, the facilities for teaching, the desire to learn, have so greatly increased, is too striking to be explained away by any other suggestion than the supineness of the University herself. The extraordinarily increased facility, too, in the means of travelling, must by no means be overlooked; it would almost seem as though the University had too successfully occupied herself by contriving and interposing moral barriers, as she found the physical difficulties of access diminishing.

We have already alluded to the *primâ facie* inconsistency between the present repugnance of the University of Oxford and their protest in 1647. Now, as then, they refuse to submit to inquiry; now, as then, they put forward the apparent illegality of the Commission, and the apprehension of future dangers which might be founded on the present encroachment. But in October, 1647, when Naseby and Edge Hill had been lost, and Bristol fallen long before; when the king was a prisoner, sold into the hands of his enemies, and within little more than twelve months of a violent and shameful death—there was reasonable grounds for Royalist Oxford to apprehend

¹ Unless this number be as legendary as the 11,000 virgins, the boast of Cologne. These numbers do not seem likely to be restored, at least in our days. However, both cities stick to their legends, and appear to exult in departed glory, instead of crying "Ichabod."

the ulterior encroachments of the parliament, and there was glorious courage in maintaining even then the rights and privileges of their captive monarch. In 1851 it certainly is not from the monarch that encroachments are to be feared; yet with words of deference on their lips, they refuse disclosure still: and profess to allege the same reasons. The two cases seem to be but in one thing consistent; that now, as then, and always, the light is shunned.

If it be alleged that, after all, the present University system works well—that it produces great men; all our leading statesmen, historians, and scientific men, with but few exceptions—we answer that, in the first place, as to scientific men, to produce whom ought to be the main object of an University, the allegation is not true.¹ And as to statesmen and literary men, they have, as a matter of course, passed through our Universities in the mechanical routine of education. It does not follow, as has been remarked over and over again, that they are learned *because* they have been educated there. *Post hoc: non ergo propter hoc.* There were in the middle ages many most eminent astronomers, geographers, chemists and metaphysicians, as well as classical and mathematical scholars: all of whom attained distinction after having studied at such Universities as they had access to. Was it therefore impolitic ever to change the course of study then in vogue? Have Newton and Leibnitz, Bacon and Reid, Porson and Bentley, lived and taught in vain? Is it certain that, although improvements are admittedly capable of being made in knowledge, no improvement can be introduced into the mode of imparting and diffusing knowledge? or after the memory of so many revolutions, can we sit down, satisfied that we have reached perfection? The matter is surely worth inquiring into.

One of the most important topics suggested by the Commissioners is marked by them in italics in their Circulars to Fellows, &c. of Colleges. They appear by it to have in view the restoration, at least in name, of as many as possible of her 30,000 alumni to the University. "*Though it be impossible to take the masses to the University, is it impossible,*" they ask, "*to take the University to the masses?*" and they proceed to explain how: viz. by a great extension of the Professorial System, establishing in all populous districts schools, or, more properly, Branch Universities, with proper Professors established in each: attendance at which schools or lectures shall be

¹ A very small proportion of our leading civil or military engineers, chemists, mineralogists, &c., are members of our Universities—and fewer still acquired their science there.

deemed equally efficient preparation for taking University degrees as actual residence at the University.

In connection with this topic is that other important one, whether it would not be practicable and advantageous greatly to diminish the duration of residence at the University at present required before admittance *ad respondendum quæstioni*. Three years and a quarter are now required to be spent in actual residence at the University before approaching the examiners for the most ordinary degree of B. A. This was not an improper limit, no doubt, when it was first appointed; when students commenced their course of studies with little previous preparation, and at a very early age. But at the present day, the average of freshmen are as old, and have either at private or public schools gone through as long and severe a course of study as the average of Masters of Arts in the time of Wolsey. Not only are the average of freshmen as well qualified now for the degree of B. A. as questionists used to be; we believe the practical result of our University system to be, that freshmen in the present day are in general as well prepared as questionists for their degree. We of course except the high honours; but for the lower classes in honours, and for the ordinary degree, we believe that students would be just as successful in their first year as their last. The average of plucks is estimated at one in four: take the freshmen in October, cram them for three months, and we will be bound they will show as good an average. We again say, that of course we except high honours, in which a freshman, though never so well prepared, cannot of course compete against another, equally well prepared, and who has had three years additional training. But the generality of men, knowing from their first entrance that they are only destined for the "poll;" feeling and disdaining the facility of the examination, and knowing that it is three years off, usually enter on a course of living which necessarily leaves them, as questionists, less prepared and less capable of application than when they were freshmen; and forces them, at the eleventh hour, upon the "cram" system of private tutorage, as their only means of safety, to enable them to pull through. An evil which seems to have subsisted for some time, since it is alluded to by the celebrated Mr. Miller. "No wonder," says he, "our colleges are so learned; for we see how many students do every year carry each some learning thither, and how few do fetch any away." This dilatoriness, therefore, in the University, in the admission to degrees, produces two evils, each the fruitful parent of many more. (1.) It induces habits of long continued idleness in students, with all the attendant train of dissipated and

vicious expedients for killing the time which might be so much more cheaply spent in study; to say not a word of the moral influence of such habits. (2.) It thrusts the student, thus enervated and debilitated in mind, upon the emasculating system of private tuition. It is impossible for ingenuity to invent a scheme which shall combine any species of education with such enfeebling results as this. Whereas the object of education is twofold; the first to provide food for the mind; the last, and by far the most important, to train the young student to select his own food: this system of private tuition trains the student entirely to depend upon others for this most important faculty. We know nothing (*experto crede*) more bewildering than for a victim of this system, always accustomed to "get up" merely selected portions of selected books, than to be turned adrift into a respectably filled law library, and told to learn law. An oarless boat on the Atlantic is a joke to it. And this is what Sir R. H. Inglis knows to be a main feature in the system which he particularly praises for the salutary effects of the training through which the pupil is led.¹

We are extremely glad to observe that the Commissioners seem keenly alive to this, the greatest evil of the University system, as we really believe. It is very difficult to discover a remedy for it.

The expenses of living, we know (at least at one of the Universities), to be greatly overstated in the exaggerated declamations of those who have had no better arguments than stories about extravagant young lords coming home to cover their "governor's" breakfast table with unpaid bills. In this respect we are confident that the University authorities will have nothing to fear from the strictest investigation. We really believe that whatever, under the present system, it was possible to do, they have done,—that they have always been ready to adopt every check, and that the evil is not nearly so great as is commonly supposed.

The heads or topics of information enumerated in the circulars of the Commissioners, seem to comprehend most of the usual points upon which mismanagement is alleged to exist, or modifications suggested; e. g. in colleges inquiry is made as to absentee fellows or fellows resident, but without occupation,—the management of the college property—the number of students and per centage of plucks,—the restrictions to founder's kin, &c. And in the University the topics include the professors, and the number of their pupils,—the emoluments of the professors

¹ Speech on the University Commission, 18th July, 1850.

and other officers,—the opening of the public library,—the jurisdiction of the Vice-Chancellor's Court,—the sources of the University income, and its application, &c. There are, however, two or three points unnoticed, upon which investigation would, we are convinced, probably lead to some measures which would give great relief to the University. The first is a revision of the value of the livings in the *Liber Regis*. In many colleges, if any fellow acquires an ecclesiastical benefice estimated at 5*l.* per annum in the *Liber Regis*, which was compiled in the reign of Henry VIII., he must vacate his fellowship—but may retain it, if the benefice be below that limit. Now, as some livings, not then worth 5*l.* per annum, are now worth many hundreds—while others, then estimated at 20*l.* or 30*l.*, are scarcely or not at all increased,—many fellows hold, without vacating their fellowships, ecclesiastical benefices of great value; while other livings of small value, which might with great advantage be filled by some otiose resident at the University, is deprived of that benefit, because it would force him to vacate his more valuable fellowship. A revision of the *Liber Regis* would cure this, and means might be provided for future periodical revision. This can evidently not be effected by the University of herself. There is another anomaly, which is felt as a hardship; the benefice must be an ecclesiastical benefice, otherwise the fellowship may be held with it. Thus a professorship in a Scotch University, worth 1500*l.* per annum, may be held by a fellow of a college in an English University. But the same, or any other fellow, might forfeit his fellowship by accepting a Westmoreland living of 30*l.* per annum.

There is a singular narrowness of constitution in the whole body of the University Senate or Convocation. We believe the same system prevails in each University. When any proposition is to be considered, a grace or motion must first gain the consent of the whole caput; a single veto here throws it out for ever, or at least for that term. If it pass the caput, it is submitted to the votes of the Senate in general, who are at liberty only to vote-yea or nay, without discussion, without amendment. This seems a singular constitution to exist in an Anglo-Saxon corporation; it might surely be replaced by something better.

Sufficient attention does not seem to be drawn to the discipline of the University, considered with reference to the age of the students. We allude particularly to the usual cases of proctorial intervention. Rules, which were established for boys of twelve and thirteen, *may* be adapted for the government of grown men of from nineteen to twenty-one; but this is scarcely to be expected, and certainly cannot be assumed. Besides, if you

treat a man like a schoolboy,—wall him in with spiked rails,—chase him when caught out of bounds,—set him chapters from the Bible to learn by rote,—he will think and act like a boy to the end of the chapter. This is felt, even although the statutes (which constantly in every page inflict corporal punishment on undergraduates *si per ætatem deceat*) are now, not by the prudent laxity of the University officers, but from the impossibility of carrying them out according to their literal effect, not enforced in their full rigour.

The Universities are, since the repeal of the Test Acts, in a somewhat anomalous situation as to their constituencies, all of whom must be members of the Church of England. This is the only instance in which religious opinions are regarded in qualifying for a vote. The matter is worth notice, but is of small importance in the general inquiry.

With the above exceptions—and most or all of these questions may be incidentally discussed before the Committee—the scheme of inquiry seems sufficiently wide and comprehensive. We do not anticipate that the University will have everything her own way in the Report of this Commission; but we are perfectly confident that that Report will greatly restore public confidence in the *bona fides* and general discretion with which her officers, hampered by obsolete regulations, adopted under different ideas from those which now prevail, and intended for a scantier surrounding population, for a much more juvenile community, and a more secluded foundation, have nevertheless managed to maintain their position without being summarily exploded. Imagine the nation at large restored, not to mail coaches and protection, but to a state of society much nearer the Flood,—to times when mail coaches were not yet conceived. Take for a conveyancing code the old feudal law, with all its incidents in full force,—for our bankrupt law, ear-slitting and the pillory,—for our budgets and financial statements, tonnage, poundage and ship money—what skill and temper, and uprightness would it not require to govern the kingdom at the present day in any tolerable way with such materials? Yet that is the task fallen upon the Universities,—that task they have *pro virili parte* fulfilled,—that task they (unheard of to relate!) actually seem unwilling to relinquish, or to permit their burthen to be alleviated; and they regard with fear and indignation, and as an attack upon their very existence, an inquiry which, more than any other event, seems calculated to augment their powers, and illustrate the splendour which still hovers around their names.

B.

ART. VI.—THE CHARITABLE TRUSTS BILL.

THIS is an age of improvement, perfect freedom of thought and action prevail, and no barrier is allowed to stand between full inquiry and its legitimate results. Another sign of this pervading spirit lies at this moment before us, in the shape of a bill presented by the Lord Chancellor, and ordered to be printed, on the 2nd June, 1851, "For facilitating and better securing the due Administration of Charities in England and Wales." It passed the second reading in the House of Lords on Thursday, 17th July. Few will be found to deny, that this large subject offered a tempting field for the lover of justice and reform, and it would have been well if the trustees of these charities had more generally borne in mind, that in proportion as the privileges conferred upon them by their position were great, so was the responsibility; and, also, that in all cases of charities it is a rule that the intention of the donor, so far as it is practicable and legal, shall be strictly observed, the law not permitting any deviation, except on the clearest necessity, not even with the consent of the founder's heir. Be it our task here to show whether the mode in which they have fulfilled the trust confided to them will, in most cases, bear the light of day and searching investigation; or whether they have not been practising upon the public an egregious and cruel imposition, mismanaged and neglected their trust, and disposed of the funds in a manner so arbitrary and selfish, that general discontent and dissatisfaction have been in no slight degree engendered, and a firm and fixed feeling arisen that some superior and immediate interference and control is absolutely necessary.

Many causes have conduced to this latter result. No duty is more harassing and unsatisfactory than that of a trustee; even in private matters the office is no sinecure, and, however carefully and conscientiously performed, receives but scanty thanks. In the case of a public body it is still worse; more persons are to be pleased, and the feelings are in general less involved. It is not, therefore, surprising, that on inquiry it should be found, that in most cases the duties have been neglected, and the funds misapplied. There are few whose consciences will not allow them to make a difference between a public and private creditor; who do not prefer their own interest to that of the public; who return scrupulously to the full amount under schedule D., and never keep a dog or seal a letter with a crest without paying the proper tax upon both.

Some, indeed, are found to remit to the Chancellor of the Exchequer arrears of unpaid taxes; these, however, in proportion to the transgressors are few, and most probably but death-bed and imperfect repentances. Public money in the hands of an individual, unless well looked after, bears a striking resemblance to London milk, and is pretty well diluted before it is served out. Conscience is always elastic, but will stretch to the very extreme of tenuity when the public pull the string. Self, too, in most natures predominates; and it is quite clear that the administrators of the funds of the charities inquired into by the commissioners have been no exception to the rule; they have evidently taken in a literal sense the words "Charity begins at home," and have acted most fully in accordance with this interpretation. In one of the cases certified to the Attorney-General, it appears that out of an income of 3136*l.* 12*s.* 8*d.* just 75*l.* 12*s.* 2*d.* was devoted in the year 1848 to the purposes indicated in the will of the founder. This is so happy an illustration of the mode in which these charities are so often managed, that we here pause to give it full effect. Honest trustees! conscientious self-denying individuals,—we were curious to see how many years it had required to stretch the conscience in this case to this result, and we find that the charity was founded in the year 1579.

Another case is that of the "Meer" hospital, in the city of Lincoln, which was founded by Simon de Roppell in 1244. The dean and chapter have refused all access to the records in their possession respecting this ancient foundation. It appears, that in the time of Henry III., the manor of Meer was held of the king in chief. The mastership of this hospital is in the gift of the Bishop of Lincoln, and, when the see is vacant, of the dean and chapter. The commissioners have derived their knowledge of this hospital from the public library at Cambridge and a few other sources; and one cannot help feeling gratified, that the endeavour of the dean and chapter to shield from all inquiry their gross mismanagement of the funds of this hospital, has been thus defeated. The document founding this hospital is to be seen in the "*Notitia Monastica*," and is to this effect—

"To all the faithful in Christ to whom this present writing shall come, health in the Lord. Be it known to your corporation, that under the influence of Divine Grace, for the salvation of my soul and the soul of my wife Alice, my son Hugh, my father and mother, and my predecessors and successors, I Simon de Roppell have given, granted, and by this my present charter, have confirmed in pure, free, and perpetual alms to God and the blessed Mary, and the hospital of St. John the Baptist, which I have erected in my manor of Meer, for the support in all time to come of thirteen poor persons,

as well in bed and board as in clothing and the other things necessary for the sufficient sustenance and apparelling of them, of the chaplain therein officiating and his family, all my lands which I have in Meer, with all the appurtenances, as well the services of free men as of villeins in the fields, pastures, woods and marshes (except the advowson of the church of Meer), and all my wood with its appurtenances in Bramston-in-the-Marshes, and others which by custom belong to the said wood of Bramston; and all the privileges which I possess in the common marsh of Hanworth, in wood and field, marsh and meadow, as fully as I at any time have enjoyed the same. I have also given and granted to the Bishop of Lincoln and his successors the right of patronage to said hospital; so that the Bishop of Lincoln for the time being shall appoint a fit person to be chaplain warden of the said hospital, who shall wear a certain religious habit, as the bishop may direct; and who, for the salvation of my soul, the soul of Alice my wife, of my father and mother, and of my predecessors and successors, as well as of my son Hugh, shall perform Divine service in the said hospital."

Then follow certain directions as to when the patronage is to be exercised by the dean and chapter, and directions that proper accounts shall be kept and rendered to the dean and chapter once a year. Next come provisions for extending the benefit of the charity as the funds augment, and the charter then winds up with this solemn adjuration—

"And that this my benefaction may remain stable and sure, I have hereunto affixed my seal in the presence of these witnesses, &c., and, finally, I implore the dean and chapter in the name of Christian charity, that they cordially and effectually follow up and abide by the directions of this charter in all particulars."

It will be seen how these holy men have obeyed this solemn injunction.

For three centuries after the date of this charter nothing is known of this charity; but in 1534 the value of the Hospital of Meer is returned in the *Valor Ecclesiasticus* as 5*l.* 6*s.* 8*d.*, subject to a deduction of 10*s.* 8*d.*, leaving therefore a clear 4*l.* 16*s.*

The next evidence is a memorandum of a lease, dated 20th September, 1553, by which the then warden leased to Thomas Grantham all the manor and Hospital of Meer and Bramston, to hold for sixty years at a rent of 5*l.* 6*s.* 8*d.* The lessee to furnish always three poor men with meat and drink, lodging, clothes, &c.; also to find one *honest* priest (no easy task it would seem) to maintain divine service. This lease is confirmed by bishop, dean and chapter; and is instructive, for it already shows that the persons, who had the control of the hospital in 1553, placed it in a position different from that contemplated by the will of the founder; the number of bedesmen is reduced from thirteen to three, and the warden had already delegated to an-

other the duties required of him in the performance of divine service. After this there is a gap until 1665, when Charles II. issued instructions to the Archbishop of Canterbury, directing him to procure a return from all the suffragan bishops of all hospitals throughout the kingdom, with a detail of their revenues, foundations and management.

The return applicable to the Hospital of Meer has been found in the archiepiscopal library at Lambeth, and is couched in these vague terms, worthy of Dr. Wiseman or Dr. Doyle:—"Mere Hospital, 1665. Bishop of Lincoln appoints the master, who is said to be Dr. Croft, and he puts in *some* poor men. The revenues are considerable, *but said to be perverted.*"—Codex Manuscriptorum, vol. 29, p. 422.

From this date up to the parliamentary returns in 1786, the only information is derived from a series of leases of the hospital lands granted by the various wardens, the earliest of which is an indenture, bearing date the 10th February, 1680, whereby W. Holder, the then warden, demised the hospital lands to Francis Manby for twenty-one years, at a rent of 8*l.*, and yielding and paying also the sum of 24*l.*, in equal sums of 4*l.* each to six poor men, at the feasts of St. Michael the Archangel and the Annunciation of the Blessed Mary. It therefore appears that the establishment had undergone great change in the course of 133 years. The hospital was by this time no longer in existence; the poor men, formerly inmates of the hospital, were now converted into mere out-pensioners, with fixed annual stipends, and mulcted of their board and lodging, clothing, &c.; the religious service appears to have gone long ago.

The subsequent leases for about a century have all been for terms of twenty-one years, and the same rent of 32*l.* reserved. On the 2nd February, 1805, the Rev. F. Cumming, the then warden, received a fine of 300*l.* on granting a lease of twenty-one years at the rent of 32*l.* In 1812, only seven years after this date, the same reverend gentleman demanded the exorbitant sum of 4412*l.* as a fine for renewing the lease; the lease was allowed to run on. The Bishop of Lincoln presented Mr. Cumming to another living, who then resigned the wardenship of this hospital, which was conferred by the bishop on his son, the Rev. R. Pretyman, in 1817. This gentleman is still the warden, and is also a member of the Chapter of Lincoln. In 1819, the lease devolved to Major W. Colgrave, who paid no less a sum to the Rev. R. Pretyman than 9528*l.* 4*s.* 1*d.*; in 1825, 2300*l.*; and in 1834, 1600*l.*; in all, 13,428*l.* 4*s.* 1*d.*; while the agent of the reverend gentleman pays six poor persons 4*l.* a year each, and that is now all which is really devoted to charity. We can

only say that we are glad that the conscience of the Dean and Chapter of Lincoln is not in our keeping.

The land is now valued at 1311*l.* a year.¹

Let us now take one of the charities belonging to the Drapers' Company in the city of London, and certified by the Commissioners to the Attorney-General. Opposition to the bill is anticipated on the part of the London companies; it will be well therefore to take an instance of their management to show whether they have less neglected their trust than others.

It appears that Thomas Howell died at Seville about the year 1540, and by will left to the Drapers' Company the sum of 12,000 ducats,—directing “them to buy property of 400 ducats rent yearly, and to pay the rent of the said property yearly in marriage to four maidens, being orphans, and of his lineage and blood, so that each of them should have 100 ducats; and in default of maidens of his own blood, then to give the same sum to other four maidens of good name and fame; and if the said sum of 12,000 ducats should produce more than 400 ducats yearly, to bestow *the residue* in marriage of maidens being orphans, and to the increase of the aforesaid maidens' marriage, as best should seem to the wardens of the said house.” With the money eventually received by the company they purchased property, the rental of which was 105*l.* or thereabouts, but which now amounts to nearly 3000*l.* Only the sum of 84*l.* per annum is paid for marriage portions. The property consists of houses and land in the city, and the company's hall stands on part of such land. No rent was paid for this land, until the Court of Chancery compelled the company to purchase it at a sum commensurate to its present value. The company have appropriated the residue of the 3000*l.* a year to their own purposes.²

The Hospital of St. John, in Northampton, is another good case. The exact date of its foundation is unknown. In Dugdale's *Monasticon* it is mentioned as a foundation for infirm poor. From various charters, the last of which is in the reign of Charles I., this was evidently the original object of its endowment. It appears from documents, which we have not space to extract, that this hospital has at times possessed very large estates, part of which are now lost, and that the allowance to the poor has, instead of increasing, gradually diminished. We

¹ This case was certified to the Attorney-General by the Charity Commissioners, and under a decree of the Court of Chancery the whole of this sum will be applicable to the purposes of charity when the present lease expires.

² This case also was certified to the Attorney-General, and under a decree of the Court of Chancery the whole income of the property will in future be devoted to charitable purposes.

have tracked our way through a mass of old charters and documents of various kinds applying to this charity collected in the reports. Articles have continually been exhibited against the master, and petition after petition has followed on the part of the poor. As far back as can be traced, the hospital has been conducted in the same manner as at present. The establishment consists of a master, two co-brethren and eight almspeople—seven old women and one old man, who acts as clerk. The mastership is in the patronage of the Bishop of Lincoln. The co-brethren are always in holy orders; but there have been seven masters who were laymen. The eight old people receive *1s. 2d.* a week each, and besides this are on parish pay, as the hospital allowance is so small.

The commissioners estimate the present yearly value of the property belonging to this hospital at 1700*l.*, and quaintly state that it is clear the funds of the hospital, as at present administered, are of little use to any body but the Master. This case is also certified to the Attorney-General.

We hope we have not wearied our readers by the rather long details of these cases; we think they will be read with interest, and have felt it advisable to give them, that the propriety of introducing the present Bill may be fully apparent to those who were not previously acquainted with the subject. Had we space, we could cite hundreds of a similar nature collected together in the various reports—of which St. Cross's Hospital at Winchester, Spital Hospital, and Bridewell Hospital, are perhaps the most notorious.

In many cases the revenues of charities have been lost irrecoverably from the want of some proper authority to watch over and guard the trust,—others have been abused and diverted from their proper objects, because persons locally acquainted with the circumstances have declined to incur the pecuniary responsibility, or the odium of instituting legal proceedings. Again, legal difficulties and expense have sometimes prevented the trustees from carrying into full effect the intentions of the founder. And an ancient and traditional mode of managing the trust has acquired so strong a hold on the minds of all the parties concerned, that it is more than can be expected of the present trustees to make any attempt to break the established usage, however faulty.

Besides, there are a considerable number of charities wherein the present maladministration is wholly attributable to ignorance and *want of information* on the part of the trustees; who, under competent advice and direction, would be quite willing to correct what is irregular and defective. But at the same

time the commissioners say, that they have met in many cases with the most determined opposition to the inquiry on the part of those interested in these matters; no information being given which could by any means be withheld; and they naturally say that in these cases the only inference to be drawn is, that gross speculation and mismanagement prevail.

Before entering upon the present Bill and its provisions, it may be well to take a concise view of the law, and the course of proceedings relating to charities. The 43 Eliz. c. 4, is the first statute, and by it the Lord Chancellor is empowered to award commissions to inquire of all gifts to charitable uses, and of all abuses and breaches of trust relative thereto; and to make orders for the future management of the funds. But this act did not apply to universities and cathedrals, and all colleges, hospitals and free schools, having special visitors or governors. These commissions have long been disused, and their place supplied by remedies of a more simple and effective kind; but while in use, the commissioners returned their decree into the Petty Bag Office of the Court of Chancery, and the matter was contested on the equity side of that court. The proceedings for that purpose were treated as an original suit; the parties not being bound by the evidence before the commissioners, but having power to allege what new matter they might please. An appeal lay from the Chancellor's decree. Besides this remedy, the sovereign, as "*parens patriæ*," has the general superintendence of all charities not otherwise sufficiently protected; and therefore, whenever it is necessary the attorney-general, at the relation of some informant (called the relator) files an information in the Court of Chancery to have the charity properly established. In these relator suits the relators need not be the parties principally interested; any interest in the charity, be it ever so remote, is sufficient; and in point of fact no interest is necessary, for entire strangers, in some instances the clerks of the attorneys filing the information, have been made relators. These suits seldom result in any permanent benefit to the charity. If property be recovered, or if new directions be given for the future administration of the charity, the ignorance of the parties, and the want of all means in the court for an independent inquiry, leave the charity with little or no benefit from the proceedings. But in many cases even this end is not attained. The decree having been made by the court, and lengthened inquiries partially entered into, and a goodly bill of costs having by this time run up, the matter is compromised on payment of these costs, and all future attempts for the benefit of the charity effectually prevented.

By a subsequent act, the 52 Geo. III. c. 101 (Sir J. Romilly's act), summary relief by petition on the part of the trustees only, and under the sanction of the attorney or solicitor-general, was granted in cases of breach of charitable trusts. An appeal lay within two years to the House of Lords.

By another statute, passed in the same year, provision was made for the registry and securing of charitable donations in order to prevent the funds being lost. Again, by the statute of 58 Geo. III. c. 91, a commission was authorized to inquire into the amount, nature and application of the produce of any estates or funds from time to time appropriated to the education of the poor, which powers were afterwards extended to all charities of whatever description—subject to certain specified exceptions. By 59 Geo. III. c. 91, the commissioners were also entrusted with the additional duty of certifying to the attorney-general the particulars of any case that appeared to them to require the interposition of a court of equity; upon which certificate the attorney-general was authorized to proceed, either by petition, information or otherwise, in the Court of Chancery or Exchequer.¹ This statute also authorized trustees of any charity, by consent of five or more of the commissioners, to present a petition to the Court of Chancery or Exchequer, praying for relief.

These various commissions finally terminated in 1837, having reported upon no less than 28,840 charities, 400 of which were certified to the attorney-general. Of these charities (as appears by the various reports) the aggregate income, down to 1837, was no less than 1,209,395*l.*, and by the report issued by the commission appointed on the 18th September, 1849, it is stated that the present aggregate amount is much greater. The last Commission report, "that, notwithstanding all that has been done, it appears still to them to be necessary, in order to apply an effectual and permanent remedy to the various abuses and defects, to create by legislative enactment some public and permanent authority charged with the duty of supervising the administration of all those charitable trusts." And they then offer the following suggestions:—

"That trustees should be compelled to make out annual accounts of receipt and expenditure.

"That these accounts should be audited before some local authority.

"That they should be registered in some local office, where

¹ We need hardly remind our readers, that the constitution of the Court of Exchequer was remodelled in 1841, when its equitable jurisdiction was transferred to the Court of Chancery.

they may be accessible to public inspection; and that copies should be sent to some public officer or board, at which office these accounts, and all other information respecting the various charities throughout the kingdom, should be preserved.

"That this officer or board should have authority to institute or direct legal proceedings in such manner, and subject to such control, as parliament may think fit to provide.

"That in the event of any local jurisdiction being provided for the easier and more economical regulation of charities of small amount, it should be required that all schemes ordered by such a local court be revised and confirmed by the proposed officer or board." They then state that "they are of opinion that the creation of such an authority would be the means of saving a large amount of charity property, by putting a stop to many actual abuses, either of neglect or misapplication, by advising a better administration to trustees, who are willing to be advised, and in many instances by preventing expensive litigation, *which would seldom be found necessary when it was generally known that any instance of neglect or malversation would meet with a prompt and certain interference.*" The commissioners propose to pay the expenses of this board by a tax on the charities themselves, and state emphatically that the large revenues and benevolent intentions of the founders of these charities demand from the state some better security than at present exists, for their due and beneficial administration. In this recommendation a prolonged inquiry of very many years has terminated, and the result is the present Bill introduced by the Lord Chancellor. The time occupied in this inquiry is not matter of surprise, for there is a tenacity of life and an anti-Malthusian tendency to multiply in all salaried commissions, only equalled by the feline race; the number of their lives is legion, and they crawl over the ground with stealthy step and slow, always apparently bearing in mind these lines of Euripides—

ἐπίσχες οὐτί το ταχὺ την δίκην ἔχει
βραδεῖς δὲ μῦθοι πλείστον ἀνύουσιν σοφόν.

Phœniss. 442, 443.

It should also be remembered, that the labour of hunting up evidence of the deepest "black letter" character, and many hundred years old, as well as the hostile feeling experienced at almost every turn by the commissioners, rendered their task by no means light. It is highly creditable to them that they have accomplished it at all.

The Bill which has just been introduced into the House of

Lords, and which has (as we before stated) passed the second reading without a dissentient voice, is intituled "An Act for the better securing and facilitating the due Administration of Charities in England and Wales."

The first few sections of the Bill are taken up with the appointment of the commissioners, who are to be not fewer than five in number, two of whom are to be salaried, to form a corporation under the name and title of the Charity Commissioners for England and Wales, with a common seal, and to sue and be sued in their corporate name. The two paid commissioners must be barristers or pleaders of at least ten years' standing. The salary of the chief commissioner is in no case to exceed 2000*l.* a year, and that of the second paid commissioner 1200*l.*

The 8th section enacts, "that the said commissioners are hereby empowered and required, when and as occasion may require, and the said commissioners in their discretion shall think fit, to examine, inquire into and investigate the nature, condition, value, management and application of all charities in England or Wales, and of the estates, funds and property belonging or which heretofore may have belonged thereto, and of the income and produce of such estates, funds and property (except as hereinafter provided and excepted), and also to examine, inquire into and investigate all breaches of trust, irregularities, abuses, defects, errors or misconduct relating to the management, letting or condition, or the application or non-application of such charities, or such estates, funds or property, or income or produce, respectively."

By the 9th section, "the said commissioners are also hereby empowered and required, in such form and manner as they shall prescribe, to receive and entertain any application which shall or may from time to time be made or addressed to them the said commissioners, by any trustee or other person interested in any charity, for their opinion, advice or directions, respecting any such charity, or the management or application thereof, or the estates, funds, property or income thereof, or generally in relation thereto; and if they shall so think fit, upon every or any such application, to give such opinion, advice or direction as they shall think expedient, and that such opinion, advice or direction shall be in writing, signed by two or more of the said commissioners (of whom one at least shall be a paid commissioner), and sealed with the seal of the said commission, and shall be addressed to the person or persons by whom such application shall have been made, and may be in such form and terms as such commissioners shall think fit; and that such opinion, advice or direction, may from time to time be revoked, altered or modified, in such manner and to such extent as the said commissioners shall think fit; and that subject to any order or direction which may be made or given by any competent court of law or equity, or by any

master or county court judge acting under the provisions of this act, in respect of all or any of the matters comprised in or affected by the opinion, advice or direction given by the said commissioners as aforesaid, and until any such order or direction shall be made or given, and after any such order or direction shall be made or given, so far as such opinion, advice or direction of the said commissioners shall not be altered thereby, every trustee and other person who shall act upon or in accordance with the opinion, advice or direction given by the said commissioners, shall be held harmless and indemnified in respect thereof; and no such order or direction to be made or given by any such court, master or judge as aforesaid, shall have any such retrospective effect as to interfere with or impair the indemnity which is by this act given to trustees and other persons, who shall have acted upon or in accordance with such opinion, advice or direction of the said commissioners: provided always, that nothing herein contained shall extend to indemnify any trustee or other person for any act done in accordance with the opinion, advice or direction of the said commissioners, if such trustee or other person shall have been guilty of any fraud or wilful concealment in obtaining such opinion, advice or direction."

The 10th section gives power to the commissioners to issue precepts for the production of accounts and documents, and the attendance of witnesses.

The 11th authorizes the commissioners, or any one or more of them, to examine witnesses upon oath. The Bill also inflicts a penalty on any one, except "purchasers without notice," who refuse to obey the precepts of the commissioners. But persons are not bound to criminate themselves by their answers. Nor are mortgagees and trustees bound to produce deeds without notice to mortgagors or cestui que trusts. All officers having custody of records must furnish copies and extracts if required by the commissioners.

The 16th section gives power in any and every case, in which it shall appear desirable to the commissioners, to certify cases to the attorney-general; who thereupon, if he shall think fit, shall institute legal proceedings with respect to such cases, either by petition to the Court of Chancery, or, as to certain cases coming within their jurisdiction under this act (see below), by proceedings before a master in Chancery, or any county court judge respectively.

The 18th section relates to the important matter of the mode in which the funds, necessary for the maintenance of these proceedings, are to be raised. The revenues of the charities are to be taxed; but in no case is the charge to exceed a sum of two-pence in the pound, on incomes of charities amounting to, and exceeding 10*l.*, which charge is to be paid and collected in

such manner as the commissioners shall direct. The first payment to be due three months after the passing of this act; but in no case is the annual assessment to exceed on any one charity the sum of 50*l*.

The 20th section provides a penalty for the non-payment of this assessment, and if there be any annual surplus of the fund to be raised under this act, it is to be invested in government securities in the name of the commissioners.

The accounts are to be audited and passed annually. By the 25th and 26th sections, in case any proceedings against any charity should be instituted by any person, except the attorney-general, notice of the same must be given to the commissioners, who may, if they think proper, suspend or prohibit any proceedings; and by the 27th section the courts are prohibited from entertaining any proceedings as to charities, without the production of the certificate of the commissioners, except when the attorney-general proceeds *ex officio*.

Proceedings already commenced and pending are not to be affected by this act.

The 29th section states the cases in which application may be made to a master in chancery by state of facts, where the income of the charity is more than 30, and less than 100*l*. a year. The state of facts must be verified by affidavit, when the master shall proceed to make such orders as are now made by the court.

By the 38th section the county courts are to have jurisdiction in cases where the income of the charity does not exceed 30*l*. But the commissioners may direct cases, within the jurisdiction of the county courts, to be taken before a superior court in the first instance; and any order made by a county court judge must be confirmed by the commissioners. An appeal lies by petition to the Court of Chancery within three months, and the 49th section provides, that no master in chancery, or judge of the county court, shall, upon any proceedings under this act, have jurisdiction to try or determine the title at law or equity to any real or personal property, as between any charity or the trustee thereof and any person holding or claiming such real or personal property adversely to such charity; or to determine any question as to the existence or extent of any charge or trust.

By the 51st and 52nd sections, land holden upon trust for a charity, subject to the jurisdiction of a judge of the county court, when the income is less than 30*l*. may be vested by order, and without any conveyance or assignment thereof, in the charity commissioners, who are however to be bare trustees; and no

such vesting order is to be made, in the case of corporations, without the consent of such corporation, or, in copyhold hereditaments, without the consent of the lord or lady of the manor.

The 55th section enacts, that every application to the Court of Chancery, or to any master in chancery or judge of a county court, under the jurisdiction created or confirmed by this act, may be made by her majesty's attorney-general, or by all or any of the trustees, or persons administering the charity, or by any person or persons claiming to administer the charity, or any two or more inhabitants of any parish or place within which the charity shall be administered, or be applicable.

The 58th section is important, for by it the trustees of any charity must deliver every year to the clerk of the county court a correct statement of income and revenues, and a correct balance-sheet, a duplicate of which is to be sent to the commissioners, who must also have their accounts audited from time to time, and make an annual report of their proceedings to parliament.

Many sections of the act are taken up with the subjects of the exchange of charity lands, redeeming rent charges, notice of death of trustees, granting building leases, working mines, doing repairs, compromising claims, &c. &c.; and the 73rd section gives power to unite charities of a similar nature, due regard being had to the objects and intentions of the founders of such charities respectively.

We make no apology for thus setting out at length the provisions of this Bill, for it embraces a subject of great importance and almost universal interest; scarcely any district, town, or even village being unaffected by it. Its objects may be shortly stated to be,

1st, to provide a body conversant with the subject, to whom trustees of charities may resort for information; and whose directions, if followed, will be a guarantee to such trustees against responsibility.

2nd, to provide cheaper tribunals for charities under 100*l.* a year.

3rd, to enable commissioners to certify cases to the attorney-general as fit for proceedings.

4th, to stop the present relator suits, which are generally instituted by hungry attornies for costs.

5th, to institute a cheap, and readily accessible tribunal, in which all matters relating to the management and revenue of these charities may be inquired into and redressed.

But by far the most important improvement seems to us to be the provision, that the amount of receipts and disbursements

of the trustees of charities shall be annually delivered to the clerks of the county court of the district in which the charities are situated, which accounts are to be registered, and open to inspection at all reasonable hours, on payment of a shilling.

There is besides, the additional guarantee of the report which the commissioners are obliged annually to make to parliament, and the accounts which they also must send in. Publicity is all that is required ; public opinion and the press will soon correct whatever is wrong. We live in a state of society, in which intelligence is so rapidly diffused by means of the Post Office and the press, that no gross act, either of oppression or speculation, can be committed in any part of England, without being in a few hours known to and discussed by millions.

The Bill, as it at present stands, deals with permanently endowed charities only, and none of its provisions extend to charities wholly supported by voluntary contributions. The Bill will doubtless meet with opposition on the part of the great London Companies, whose plea for exemption, uttered in the House of Lords by Lord Stanley, (who however expressed himself strongly in favour of the Bill,) was supported by no proof that their charities are immaculate, and do not require, as in the case we have cited of "Howell's Charity," belonging to the Drapers' Company, the most searching inquiry. We have considered the Bill carefully, and cannot see that any fair objection can be raised against it. No one will now deny the abuses and mismanagement which have gradually crept into almost all charities of ancient date. That they exist is undeniable—admit their existence, and also the fact that the funds and management of these institutions have been left hitherto unchecked in the hands of the trustees, and no further plea for this Bill is necessary. Its power will only be felt when it is needed ; it will be a terror to the sinner, and an assistance to the conscientious ; and lastly, it will not interfere with, or contravene, the wishes and intentions of the beneficent founders of charities, but simply take care that they shall be duly fulfilled.

R. F.

ART. VII.—THE BILL FOR THE BETTER ADMINISTRATION OF JUSTICE IN THE COURT OF CHANCERY, AND IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

WE have still to regret the extremely inadequate measures proposed by the Government for the reform in the Court of Chancery. Since we last reviewed the prospect of legislation in this direction,¹ two great advantages have been gained. The inconsiderate propositions then before the House of Commons have been withdrawn; and instead of an act which would practically have insured the subtraction of one-third of our judicial force in equity (since under the proposed scheme the Master of the Rolls would never have been found in his own court), we have had our judicial force augmented by the appointment of Sir G. J. Turner to the Vice-Chancellorship, to the great satisfaction of suitors generally, and not a little to the credit of Lord John Russell for having selected a political opponent for advancement. Instead of only two Vice-Chancellors, therefore, as was threatened, and a Master of the Rolls sitting as Lord Chancellor, we have three Vice-Chancellors and a Master of the Rolls, with the Lord Chancellor as before. So that our inferior tribunals have double the judicial force which was anticipated, and the tribunal of appeal is no worse—for in the Court of Chancery, although complaints are still rife upon the subject of arrears, yet the Lord Chancellor, by his unwearied attention and inexhaustible urbanity, by his indomitable industry in mastering details, and his undeniable “pluck” and independence of spirit, has conquered the “situation,” and bids fair to be as popular a chancellor as he deserves to be. If he do not always command success, he always strives to deserve it. There are arrears, but the chancellor does, as he always has done, his best—and his best now is a very different thing from what it was twelve months ago.

The change, then, in the prospects of the Chancery Courts, as far as their present position goes, is entirely favourable. As regards the prospect of permanent improvement for the future, it is as bad or worse than ever. Indeed, we almost feel inclined to wish that the original bill of March last² had been allowed to go on. It would very speedily have brought matters to a crisis. The late hot weather would have done it. With two

¹ See Law Mag. for last May, Art. VII.

² Introduced 27th March, Hans. Parl. Deb.

Vice-Chancellors to do all the original hearings, and bankruptcy and petition business, and a Master of the Rolls thrust in the first week of his judicial existence to hear the appeals, the whole machine would very soon have come to a dead lock. And as when matters are at the worst they begin to mend, we might then have had some rude blows, by which the Great Seal might have been broken—splintered, we believe is the phrase; until which event takes place, chancery reformers never will be at rest, nor will any government have quiet. For, as has been urged and acknowledged over and over again, it is by the admission of every Lord Chancellor since the time of Lord Eldon IMPOSSIBLE to find one man who can duly fulfil all the multifarious duties of that office. To regret the necessity of separating these functions, therefore, and of providing more than one man to do that work which no single individual can accomplish—and live—is as weak and childish as it would be to lament that there are but twenty-four hours in the day.¹ What is it that these self-styled guardians of the chancellorship lament? Is it the unfitness of any individuals now-a-days to perform high judicial functions? But there are abundance of men whose learning, uprightness and industry qualify them for any office. At any rate, there are as many men as would be required. Do they lament with Mr. Canning the withdrawal of the grand prize from the ambition of the bar? But we propose, according to Lord Langdale's plan, or a plan somewhat similar, to have three prizes instead of one. Will they tell us with a groan that "there were giants on the earth in those days," and deplore the degeneracy of modern lawyers? Then we beg of them, even on their own statements, not to place on the shoulders of one degenerate modern a load two or three times as great as what made their sturdiest giant stagger. Their favourite "giant," we suppose, would be Lord Eldon; and we must be allowed to remind them that he was considered quite incompetent to perform the whole task he undertook, and so perseveringly clung to. Nor was this disparaging estimate entertained by ignorant innovators or political opponents alone. The Select Committee of the House of Lords, appointed in 1823 to examine into the delays, &c., in the Court of Chancery, reported unanimously that "there was at that time A MANIFEST IMPOSSIBILITY that any person holding the Great Seal could find time for the performance of all the duties of his high office." They did not indeed proceed explicitly to declare that those

¹ "Unless your lordships can add to the twenty-four hours, it is impossible that any one individual can perform the duties already imposed on the Great Seal."—*Lord Cottenham*, 1836, Parl. Deb.

duties were not duly performed by Lord Eldon; but the general terms above quoted, and the occasion of the appointment of that very committee making the report, sufficiently declared their opinion. And if there was a manifest impossibility in 1823, it is still more strikingly manifest now. The appeal business may be described with tolerable accuracy as a percentage of the suits decided before the Vice-Chancellors' Courts and the Master of the Rolls. These courts, two in number in 1823, have been four ever since 1841. This alone would lead us to expect a similar augmentation in the number of appeals. But beside the greater facility of coming to the hearing from this cause, there has been a continued series of efforts on the part of the equity judges, in general extremely well directed, towards expediting and cheapening the steps of proceedings in a suit. So that the suits might be expected to be more than twice as many as in 1823. They are actually, however, scarcely so much; the average number of causes disposed of (including the dropped causes) in the years 1819—23 having been about 900 per annum, and in the years 1846—49 about 1600 per annum. The increase is still very considerable; and if we reflect that owing to the much longer delays prevalent thirty years ago, the "dropped causes" bear a far greater proportion to the whole than they do now, and also that a vast variety of matters now come before the courts by petition which at that period either were totally excluded, or were only admitted by the usual proceeding on bill and answer, we shall see that the real increase in the work done at the present day by the inferior courts is probably more than double what was done in the period 1819—23.¹ And the appellate business of the Lord Chancellor has increased in a similar ratio accordingly. How then can the weaker men of the present generation be called upon to perform more than even Lord Eldon ever undertook? As regards political avocations, it may be said that no discussion of the present day is equal in importance to the Emancipation and Reform Acts, which hung like contending clouds over the heads of every Government for the last fifteen or twenty years of Lord Eldon's continuance in office. But to a political Lord Chancellor every measure is of distracting importance which bears in its fate the fate of the Government; whether he strive to establish the barefaced but too successful impositions of a Pacifico, or struggle with all the might of learning and

¹ The numbers above quoted are from the Parliamentary Returns and include causes only, not petitions, &c., of which we have seen no return. All causes "disposed of" are included, whether actually heard, or compromised or abandoned.

authority to perpetuate the disabilities of half the population in one kingdom, and the whole population in another. In each case, as far the Lord Chancellor is concerned, the seals are at stake, and, personally, he is as much interested in the one question as the other. And as to the other important functions of the Lord Chancellor besides sitting as a judge of appeal in chancery and a leading member of the Government in the House of Lords, e. g. in his characters of chief judge of appeal in the House of Lords as a court of appeal, privy councillor, quasi minister of justice, referee and law adviser of the Government, guardian of lunatics, &c. &c., in every one of these respects it will be readily conceded, or, if necessary might be very readily proved by the returns, that his duties are more onerous than ever. Under such circumstances, how can any person be found to withstand the appeal of common sense, that one man should no longer be compelled to pretend to do the work of three?

We forego all advantage of the excellent arguments showing the absurdity of a political Lord Chancellor, the loss of time, the loss of money, and the abnegation of all principle. We will not ask, or at least will not examine, how a system can be endured under which an admirable judge, just as he had acquired the confidence of the suitors and a full confidence in himself, should drop at once from the bench because a Hellenizing Portuguese Jew cannot make a British senate believe his preposterous inventions (as Lord Cottenham might have fallen); or how another equally admirable judge should drop from his seat through the failure of the potatoe crop in Ireland (as Sir Edward Sugden did). The intendant in *Gil Blas* excusing his master's non-attendance to greet the arrival of a royal guest, gave fifteen excellent reasons for his absence, and as the sixteenth, that he had died three days before. We shall not enter into the various other excellent arguments which have been so often urged against the existing system. We are content to rest the decision of the question on the manifest impossibility of the case so loudly declared by the Lords' Committee in 1823. We will still hope that that which has been for so many years admitted to be manifestly impossible to be performed, will at last cease to be attempted.

We fully and readily admit, however, the great difficulties in the way of a reform; difficulties, which, as in almost all other reforms, reside in the reconstructive part of the operation. Sever the functions of the Lord Chancellor, let the Keeper of the Great Seal no longer sit in Chancery; and how is he to be replaced? Who is to be the Judge of Appeals in Chancery?

Shall the court still consist of a single judge? Who shall preside in appeals in the House of Lords? Take away from the Lord Keeper of the Great Seal all his judicial practice and habits, and he will soon cease to be an efficient legal adviser of the government, such as the Chancellor is at present; and he is the sole legal adviser in the Cabinet. The steel will soon get dull unless it be kept in constant use. On the other hand, if the Lord Keeper preside in the House of Lords, without any other judicial functions, it is to be apprehended that he will be less efficient than other judges whose judicial habits have been kept in constant exercise. And there is no spectacle more unseemly in a court of justice than a president of less authority than an inferior judge, unless it be a judge succumbing to an advocate. Then there is the Judicial Committee of the Privy Council, which is susceptible of amendment; and if retained as an independent court, by multiplying judges and jurisdictions, greatly augments the confusion. Besides there are various questions as to the hands to whom various other duties now discharged by the Chancellor should be entrusted; which, however, are of comparatively less moment.

The confusion engendered by the consideration of the reform of the Judicial Committee, however, we should clear away by a very simple yet serious expedient (*viz.*) the establishment of one Court of Appeal for all matters, instead of two. At present, there are the House of Lords and Judicial Committee of the Privy Council, totally independent of each other, and each without any common court superior to both, by appealing to which incongruities, if they arose, might be corrected. Such a division can only expose us to the risk of uncertainty from contending decisions. Each tribunal decides questions arising on common law, equity and civil law, and acknowledges no superior but an act of parliament. Lord Langdale, struck with the same incongruity, proposed in 1836 that there should be but one Supreme Court of Appeal; but he proposed to commit it to the hands of the House of Lords, a Lord President and Lords Assistant being created for the purpose of giving its decisions due solemnity. We confess that we should prefer to see the Judicial Committee, or some such tribunal, (empowered, of course, by act of parliament,) entrusted with the ultimate appellate jurisdiction, for reasons which we have stated more at large in some observations which will be found in our last volume (vol. 45, pp. 47—51). But without recapitulating the reasons for this preference, or insisting any preference for one tribunal over another, it is surely evident that there should be but one such court. In addition to the above reason on principle, there is to be taken into consideration the great practical

convenience in having only one court. Each is at present inefficient, or less efficient than it might be, from precisely contrary faults; the Judicial Committee wants a head, the House of Lords wants a body. The difficulties in the way of providing an effective head for the Judicial Committee seem insuperable. Lord Brougham's Bill for that purpose met with a reception not encouraging to renewed attempts. And the President of the Council is, of course, a mere political appointment without the slightest reference to his legal acquirements. And in providing a body for the House of Lords, we must either select such legal dignitaries as are already members of the Judicial Committee, in which case we run into the incongruity of having the same individuals constituting two Supreme Courts of co-ordinate jurisdiction according as they sit in this room or that; or else, we must select and create other worthy legal dignitaries, who, probably, will be scarcely of equal reputation with the former, and will certainly all together swell the number beyond what is decent or expedient or economical. This consideration, although we think we have rightly placed it both last and least, is yet of no light moment.

The Bill now before the House of Lords enacts that the two proposed new judges shall, if Privy Councillors, be members of the Judicial Committee. But this is throwing water into the sea. There are already thirteen members of this Committee. It is a head that is wanted to that body—not additional joints to the tail.

It is intended of course in the passage through the House of Lords to replace the clause which originally authorized their lordships to summon any of the equity judges to give their assistance in cases of appeal, and which clause was omitted by the House of Commons as involving a question connected with the privileges of the Upper House. That clause would go far to provide some remedy for the defect which we have remarked in the constitution of the House of Lords as a Court of Appeal, viz. the absence of a body. In general it consists of the Lord Chancellor. But why was this idea not to be carried out further than as regarded the English equity judges alone? In deciding on questions of Scotch law, why should their lordships not have the power of requiring the valuable assistance of the Scotch judges? In matrimonial causes, why should they not be empowered to summon the judges of the Ecclesiastical Courts? There is less occasion for providing any assistance of this description for the Judicial Committee, as it is already strong in numbers, and the members are judiciously chosen from those who have attained eminence in all branches of the law. But it

is possible they might deem the same assistance of advantage occasionally, and particularly in connection with ecclesiastical law. It was Lord Brougham who pointed out the extremely difficult and often obscure nature of the questions which under this head come within their cognizance. It would no doubt be somewhat harassing to our judges to be thus rendered liable to summonses in different directions by courts entirely independent of each other's action and control. That is one of the inconveniences which would be avoided by the merger of the two jurisdictions into one.

The only other provision in this Bill which affects the Judicial Committee, beyond adding the two new judges, if Privy Counsellors, to that Committee, is sect. 15, which reduces the quorum of the Committee for hearing appeals from four to three. The change we suppose is deemed necessary to meet the convenience of members, or it would not have been made; since change for changing's sake, always an evil, is nowhere so much to be avoided as in the machinery for the administration of justice. The change, however, such as it is, has nothing but the convenience of the members to recommend it. Of all numbers of judges, four is that which is certain in case of difference to secure the largest majority—three against one; and it would have seemed a more fitting opportunity to insert a clause reducing the quorum in a Bill by which the whole number of the Committee was being diminished—not where (as in the present Bill) the Judicial Committee is being augmented. It affords, however, a very clear proof of the unfitness of the House of Lords, as at present constituted, to form a court of appeal. For if it be found so extremely inconvenient to convene a quorum of four of the Judicial Committee as to suggest a measure which, like the present, diminishes the quorum and increases the number of the whole body from which the quorum may be taken, how much more impossible must it be to get together any satisfactory quorum in the House of Lords, where the "Law Lords" are seldom more than five or six in all, and where the appeals are nearly twice as numerous as before the Judicial Committee?

But dismissing the consideration of the amalgamation of the courts of ultimate appeal, which is not alluded to in the Bill, the next object is to provide for the proper discharge of the duties at present discharged by the Lord Chancellor as a Judge of Appeal in the Court of Chancery, and, in general, most efficiently discharged. The present Bill aims at effecting a very considerable alteration here. It provides for the appointment of two new judges, who may without the Lord Chancellor exercise all this appeal jurisdiction. And it may safely be sur-

mised that the effect will be that these two will for a great part of the year have to perform all the appeal business usually done by the Lord Chancellor, although the Bill affects carefully to provide that either of these new judges sitting with the Lord Chancellor, or the Lord Chancellor sitting alone, may hear any such appeals.¹ So long as the Lord Chancellor has all the other multifarious, onerous duties of his office to perform, he will be compelled, at all events from January to August, or during three-fourths of the judicial year, to avail himself of every legal means of relief. In order conscientiously to discharge those functions which he alone can discharge, he must abstain from taking up any business for which the legislature has already provided a substitute. We think that the decisions of the new Court of Chancery, two judges sitting as contemplated, will be no whit superior in weight, in consistence, or in expedition. The multiplication of judges by no means multiplies the authority of the decision, even if unanimous. The decisions of the Court of Queen's Bench, of Common Pleas, or Exchequer sitting in Banco are not, even when unanimous, of higher authority than those of the Lord Chancellor sitting alone. And introducing a plurality of judges introduces also the possibility of a division in opinion. If the judges of the proposed court of appeal be equally divided in opinion, it is provided that the decree, &c. appealed from shall be affirmed; but it is unnecessary to point out how much more encouragement there is under such circumstances for prosecuting a further appeal to the House of Lords, than if the first appeal, thus dubiously affirmed, had never taken place at all. Neither is a tribunal with many judges more rapid in its decisions than a tribunal which consists but of one single judge. The responsibility thrown upon a single judge may, it is true, in many cases, and especially while

¹ It shall be lawful for her majesty from time to time, by letters-patent under the Great Seal of the United Kingdom, to appoint two persons, being or having been respectively barristers-at-law of fifteen years' standing, to be and be styled Judges of the Court of Appeal in Chancery; and the Lord Chancellor, together with such two judges for the time being appointed as aforesaid, shall form the Court of Appeal in Chancery (s. 1).

All the jurisdiction, powers and authorities of the said Court of Appeal may be exercised either by one only of the judges for the time being appointed under this act and the Lord Chancellor sitting together as such Court of Appeal, or by both of the judges so appointed sitting as such court apart from the Lord Chancellor, either in his absence from the said Court of Chancery or during the same time as he is sitting in such court: provided always, that the Lord Chancellor shall and may also while sitting alone or apart from such two judges have and exercise the like jurisdiction, powers and authorities, as well as all such other jurisdiction, powers and authorities as might have been exercised by the Lord Chancellor if this act had not been passed (s. 10).

the judge is yet new to the bench, induce delay by the anxiety of deliberation. But the habit of exercising such a responsibility continually, augments the self-reliance and readiness of the judge; so that in general a judge is rapid in proportion to his experience.¹ And judgment, sometimes reserved, is in many instances given immediately after the reply. On the other hand, where many judges have to give the decision, it is almost in every case necessary that they should consult, if they agree to ascertain whether the agreement proceeds upon like grounds,—if they differ, to ascertain whether consultation may not remove the disagreement.²

In our view then, the proposed alteration is no great improvement. The decisions of the new court will not be more rapid (probably not so rapid), will not command more respect, and will tend more to encourage appeals to the House of Lords than the decisions of the Lord Chancellor sitting alone as heretofore. There is, indeed, one very important advantage which this court will have, in being enabled to hold its sittings from day to day during the whole year; and having thus a great deal more time at its disposal than the Lord Chancellor has under the existing arrangement, it may be expected, although working somewhat slower than the Lord Chancellor, to get through a great deal more work in the course of the year. And it is also but fair to admit that a very numerous and respectable party of law reformers are in favour of having a plurality of judges even in the intermediate Court of Appeal in Chancery. But while some may prefer a single judge for these appeals, and others may think a court of four judges not too numerous, all will allow that a court of two judges sitting from day to day throughout the year is much better than no court at all, or a court sitting only twice or thrice a week, as is the case at present.

The effect of the proposed measure upon the next order of courts, however, viz., those of the Vice-Chancellors' and Master

¹ Even Lord Eldon, with all his habits of procrastination, which endured to the very close of his life, is scarcely an exception to the rule above laid down. Lord Brougham in 1826, P. D. 18th May, expressed in very eulogistic terms, the almost intuitive facility with which "his extraordinary subtle and nimble fancy could bring his faculties, which were great, at the smallest period of time to bear on the largest and most difficult questions. . . . The Lord Chancellor made up his mind soon, but the infirmity under which he laboured led him into those subtle speculations which so long held back his opinions. He could see through the greatest difficulties at a glance. But of what avail was it to the suitors of his court that he made up his mind quickly? It was no benefit to them, as he would not express it."

² These observations apply merely to a Court, like the Lord Chancellor's, of intermediate appeal. The court of ultimate appeal ought certainly to consist of several members.

of the Rolls, is wholly beneficial. The state of matters at this period last year must be fresh in the minds of our readers, when Sir J. Knight Bruce was the whole effective Court of Chancery, and Lord Brougham was the whole effective House of Lords. In order to prevent the recurrence of any such confusion from a similar coincidence of sickness among our equity judges, the present measure provides, that in case the court of the Master of the Rolls, or any Vice-Chancellor, shall be closed by illness or otherwise, the Lord Chancellor may authorize one of the judges of the said court of appeal to sit in lieu of the Master of the Rolls or such Vice-Chancellor, and the judge sitting under such authority may, for the purpose of disposing of any cause or matter which has been partly heard by him, continue such his sittings, notwithstanding the Master of the Rolls or Vice-Chancellor, in whose stead he has partly heard such cause or matter, may also be sitting for the hearing of other causes or matters (s. 13). This is a very judicious provision, since experience has shown us how it is very possible that occasion may arise when it may be required; and by preserving a familiarity with judicial proceedings in the superior courts, these judges will preserve themselves from that stiffness which might mar their utility if they were reserved entirely for the more solemn duties of appeal practice.

If it were but for this single provision, therefore, we think the present measure worthy of support. But it might have been very beneficially extended to meet other obvious cases. An accumulation of causes, &c., may easily arise before the Master of the Rolls, or one of the Vice-Chancellors, notwithstanding these judges continue in full health and activity. Such an accumulation has in fact already taken place more than once, and has generally been cleared away by removing a certain number of the causes, &c. set down before the overburthened judge, and placing them on the cause list of some other judge whose list was not so full. But this may not always be convenient: one judge may be overburthened, when the others have all as much as they can do. It would have been a simple matter to have extended the provisions of the 13th section already quoted, by giving the Lord Chancellor authority in such a juncture to appoint one of the additional judges of the said court of appeal to sit and hear some of the accumulations in the same manner as the judge before whom they are set down.

We hope that now, when the Court of Chancery will not necessarily follow the person of the Lord Chancellor, that other petty nuisance (which operates, however, as a great and continual obstruction to business), viz., the sittings of the Court of Chan-

cery at Westminster, even during the terms which fall within the sessions of parliament, will be abandoned. It is destructive of the time both of counsel and solicitors, and tells most against those who have most to do, i. e., against those whose time is of the greatest value to the public, that during those terms all court business should be transacted a mile and a half from their chambers and from the Masters' offices. While the Lord Chancellor was sitting now in Chancery, now in the House of Lords, there was some ground for argument in favour of this state of things. It has been abandoned as to those terms which do not fall within the period when parliament is usually sitting; which shows that the inconvenience to the suitors is only retained out of respect and necessary attention to the double avocations of the Chancellor. But now that the Lord Chancellor may be expected rarely to sit in Chancery during those two terms, it is to be hoped that the wandering propensities of the court may be checked, and that it may take up its permanent residence in the old hall of Lincoln's Inn.

On the whole, we are disposed to take the same view of this measure as was taken by Lord Brougham in the House of Lords, in a speech, which we regret to perceive, from the concluding observations, to be the last from his lips, at least for a time, in that place. We do not mean the view in his opening observations, where he seemed to give his unqualified approbation, but rather the view he took when, in the course of his speech, he had recalled the melancholy shortcomings of this measure beneath the magnificent promise in the queen's speech at the opening of parliament; when, with his own peculiar force of expression, he described this measure as a step,—not a long step, not a stride,—but still a step in the right direction; and when his lordship emphatically warned the House, lest any dreamer should for one moment imagine that this or any other structural alteration of the Court of Chancery could for an instant maintain the character of such a total reform as was necessary. We can only add the expression of our sincerest wishes, that his lordship may recover sufficient strength,—energy and intellectual vigour beyond his we do not ask,—but sufficiently bodily strength to see and take that prominent part which he alone is worthy to take in the glory of a reconstruction of the whole system worthy of himself and of the intellectual advancement of the age.

B.

ART. VIII.—COMMON LAW REFORM.

Copy of the First Report of Her Majesty's Commissioners for inquiring into the Process, Practice and System of Pleading in the Superior Courts of Common Law, &c. Presented to both Houses of Parliament by command of Her Majesty, 1851.

Letter to Lord Campbell, Lord Chief Justice of England, on Reforms in the Common Law; with a Letter to the Government of India on the same Subject, &c. &c. By Sir Erskine Perry, Chief Justice of Her Majesty's Supreme Court, Bombay. London: Ridgway. 1851.

THE Commissioners who were entrusted last year with the duty of inquiring into the procedure of the Superior Courts of Common Law have presented to the Crown the first instalment of their investigations. This Report bears date the 30th of June, 1851, being somewhat more than a twelvemonth from the time when the commission issued; and considering the extent of their labours, and the various opinions between which they have had to decide, we cannot say that the interval which has elapsed has been too great, especially when we consider that those engaged in the compilation of the Report have been closely occupied during a great portion of the year with the business of their profession. This may be looked upon as the first positive step taken at the present juncture by those connected with the administration of the law, to reform their own system; the first effort towards internal reconstruction; and we therefore feel that its appearance should receive notice in a Magazine dedicated peculiarly to legal subjects. The very brief period prior to our own quarterly publication, during which this Report has been in our hands, obliges us to confine our remarks upon it to narrower limits than we should have otherwise wished. Its contents will, we may venture to say, be well worth the careful perusal of all who are interested in the maintenance or establishment of a sound system of legal procedure. Various opinions may be, and we know are, entertained upon the extent of alteration which is required. While some persons conceive that the existing method of raising questions for the determination of a jury or a court should be entirely abolished, others incline strongly to the maintenance in its integrity of a system which has been in operation for so long a period. Our own opinion is that neither of these extreme views should be adopted. A judicious lopping away of idle and mischievous forms, combined with a prudent preservation of those parts which are founded in sound reason, appears to us to be the most proper course. Our present object is to direct attention to the leading contents of this Report, pointing out those instances

in which it appears either to meet or to fall short of the exigencies of the present time.

Somewhat more than twenty years has now elapsed since commissions with a similar object were issued. Under those commissions many most valuable changes were introduced into the practice of the superior courts. Facilities were afforded for proceedings which were most essential to the due administration of justice between party and party. A code regulating the course of pleading, known as the "New Rules," was promulgated,—framed by persons of undoubted ability and great practice, with the intention of simplifying and rendering clear the questions submitted for decision in a cause. But its good effects were considerably marred by the mode in which those alterations were carried into practice. The courts have certainly not enforced these rules in the spirit in which they were intended to operate, and the consequence has been, that the whole system has suffered a stigma, not altogether unmerited, the extent of which has, however, been a good deal exaggerated. The whole course of proceeding has been attacked from without as radically vicious. All possibility of advantageous remodelling has been denied, and a totally novel system is demanded.

It was with the object of removing these complaints, just to a great degree, that the present Commissioners have undertaken their labours; and with the view of obtaining the opinions and judgment of members of both branches of the profession to aid them in arriving at their conclusions, they, in the latter part of last year, circulated extensively certain suggestions of alterations proposed to be made by them. In answer to these suggestions, they received numerous communications, containing hints, of which they have no doubt availed themselves in the results which we find here stated. They also examined several of the officers connected with the different courts in Westminster Hall, or engaged in carrying on the business of *nisi prius* and at the judges' chambers. Information of a very valuable kind, bearing especially upon one branch of the inquiry, the subject of fees, will be found in the evidence published in the appendix to the Report.

The Report commences with the first step in an action, that of bringing the party sued before the court where the action is to be carried on. This proceeding is the writ, which has been for some years of one uniform kind, the object of it being to compel the appearance of the party sued, or at least to ensure his being made aware of the existence of a suit against him, and of enabling him to appear to it if he chooses. At present the form of action is required to be inserted in the writ; but this requirement does

not answer the end of informing the party sued of the real nature of the complaint against him, and it is therefore recommended that it should be no longer necessary. If a defendant has notice that a suit is instituted against him, it is sufficient. The nature of the plaintiff's claim is at this stage of the proceeding quite immaterial. The writ is issued by the party suing, and is served by delivering it to the party sued. At present the writ issues into the county of the residence, or supposed residence, of the defendant, and must be there served. If the defendant's place of abode is mistaken, or if two defendants sued together reside in different places, it is necessary to sue out a second writ. In order to facilitate this operation as much as possible, it is now suggested that any number of concurrent writs may be issued at once by a plaintiff, and that every writ may be served in any place within the jurisdiction of the court.

A writ of summons continues in force for four months, at the end of which time the plaintiff, if he has been unable to effect service of it, may sue out further writs, called alias or pluries writs, at any time after the expiration of the first writ. If, however, the object of issuing the first writ be to prevent a bar by the Statute of Limitations, it is necessary to issue the renewed writ within one calendar month after the expiration of the first writ, the date of the issuing and return of which must be stated upon the renewed writ. To obviate difficulties arising from the want of uniformity of practice in this respect, it is now proposed

“That the writ of summons shall have a limit, but that it may be renewed; and if renewed, shall be for *all purposes* renewed in the same manner. We suggest that the duration of the writ be six months, in lieu of the present period, which is four months, and that it may be renewed from six months to six months, within each period of six months.”

A cheaper and simpler mode than now exists of renewing the writ is provided, by the affixing to it a stamp or seal, stating the day of its renewal.

If there is ground for believing that a defendant purposely evades service of a writ, with a knowledge of its existence, the proceeding by way of *distringas* to compel an appearance must be resorted to. This process is, in fact, another mode of attempting to give the defendant notice to appear. Upon this the Commissioners observe—

“According to the present practice, the *distringas* is a very expensive, and, as it appears to us, unnecessary process. We propose that the writ [i. e. of *distringas*] be abolished, and in lieu of it, that power be given to the court or judge to order that the plaintiff may proceed at once as if personal service had been effected, or to direct

a notice to be served, or attempted to be served, in such manner as may be directed, requiring the defendant to appear; and upon this being done, to authorize the plaintiff to proceed."

This machinery appears to answer the whole purpose of the *distringas*, and at the same time to keep clear of the disadvantages which attend the present practice. The writ of *distringas* is also adopted for the purpose of proceeding to outlawry against a defendant who has quitted the country. This is a course of proceeding of the most absurdly precise kind, for it is always possible for a defendant to appear and set aside a judgment in outlawry obtained against him, without giving the plaintiff any security for payment of his debt.

"This," says the Report, "is the inevitable result of the conflict between the rule of law, that no man shall be outlawed who is not *within* the kingdom at the time of the exigent awarded, and the rule of practice adopted by the courts, not to allow a *distringas* to issue for the purpose of proceeding to outlawry, unless it be established that the defendant is *out* of the kingdom at the time; so that the proceeding can practically only be instituted in cases where the result is sure to be erroneous."

Such a proceeding, it is justly remarked, is founded upon principles wholly false, and unworthy of the jurisprudence of a civilised country. As a notice to the defendant it is practically useless; as a means of compelling payment of the plaintiff's claim it is equally inoperative. But it is most essential that there should be some easy and effective means of enabling creditors to proceed against fraudulent debtors who have gone abroad for the purpose of avoiding a judgment against them. The mode suggested is the following. The only drawback to its adoption is the chance of its being made a means of enabling proceedings to be taken behind a party's back without his knowledge.

"In lieu of proceedings to outlawry, the total abolition of which we recommend, we propose that a writ of summons may issue against and be served upon a British subject resident abroad, and that the court or a judge may have power to authorize proceedings to be had to judgment and execution, upon being satisfied by affidavit that the writ was served upon the defendant, or came to his knowledge, and that he wilfully neglects to appear to the writ. * * * We believe that it will afford some check to persons recklessly or fraudulently contracting debts here, and then setting their creditors at defiance by leaving the country; a practice of no unfrequent occurrence."

An analogous mode of proceeding against a foreigner resident abroad by a person resident in England is also suggested, in accordance with the provision to this effect which exists in France. Different opinions may be entertained of the propriety of thus

extending the jurisdiction of our courts, and we do not observe that much stress is laid upon it in the Report. This proposal is, however, quite beside the general scheme of practice suggested by the Commissioners, which will be unaffected equally by its adoption or rejection.

The writ of summons having been thus issued and served, or attempted to be served, the defendant will either appear himself, or the plaintiff will be allowed to proceed as if the defendant had appeared. This form the Commissioners propose to retain in its integrity in all cases, as a mere preparatory step to the statement of the plaintiff's cause of action. They advert to suggestions offered to them, that an appearance by the defendant is altogether needless, but they state that in their judgment "it is a convenient mode of intimating to the plaintiff the defendant's intention of resisting the action." But we cannot help observing, that the data furnished by this Report lead us very strongly to the conclusion, that, in the great majority of suits, the appearance of the defendant might be made the occasion of a final settlement of the action. Out of the number of writs of summons issued, it appears that a very small per centage indeed proceed to trial. Of those which eventually come before a jury, one-third are undefended causes. The majority of these arise upon bills of exchange or promissory notes, in which there is no real defence to the plaintiff's claim. But the defendant is, with the sole object of gaining time, enabled to place upon the record a plea denying his making or acceptance of the security. After all the machinery of declaration, plea and issue has thus been put in operation, and perhaps a jury summoned and the record entered, the parties go before a judge at chambers, who orders that the defendant shall admit what he before denied, and the farce is then gone through of the jury giving a verdict upon a matter no longer in issue between the parties. These proceedings, however, are not only unnecessary, but are very costly, and injurious by the delay which they interpose to the attainment of a judgment by the creditor. The evidence of Mr. Morris, published in the Appendix to the Report, informs us that in the Court of Exchequer, "in an undefended cause upon a bill of exchange, upon the order to admit, the court fees would be 4*l.* 1*s.* 6*d.* at the lowest." This is in addition to 17*s.* paid for entering the record, and the bill of the attorney in bringing the cause to issue. The counsel's fee, ordinarily in such cases merely a guinea, adds a very insignificant item to the costs. These court fees include 2*s.* to the chief baron's coachman!! The defect which appears to us now to exist in regard to such cases is, that the necessity for the defendant admitting his liability is deferred until after issue is joined.

We believe a very simple remedy might be adopted by enabling a plaintiff, who sues upon a negotiable instrument or other written document, where it is probable that there is no defence to the demand, and where the only question is whether the defendant signed or executed the document, to require a defendant to appear before a judge in the first instance. The writ of summons should in that case contain a statement of the substance of the claim. The defendant should be required, within the prescribed period, to attend by himself or his attorney before the judge and to admit his handwriting. If, as would generally occur, he did this, power should be given to the judge at once to order judgment to be signed for the amount of the debt, but to restrain the plaintiff from issuing execution before a specified date, if he thinks justice requires that to be done. But the property of the defendant should be bound from the date of the order, just as it now is from the delivery of a writ of execution to the sheriff. This would effectually prevent any disposal of the property in the mean time, by which the plaintiff's claim might be nullified. In order to provide for possible cases of fraud or mistake in obtaining the order, a defendant should be enabled, upon swearing to a defence on the merits, to set aside the order and judgment; but the burthen of proof should be thrown upon him. If the defendant does not appear, the judge, upon satisfactory proof that the writ has come to his knowledge, should have power to make the order *ex parte*. We think that the suggestion for indorsing the particulars of claim advanced by the Commissioners might be beneficially extended in this manner. We believe that this early appearance before a judge might be more extensively adopted; but, at all events, its application in the cases before mentioned seems to offer a clear advantage to *bonâ fide* creditors against fraudulent debtors.

Passing on to the next step in the cause, the Commissioners have decided upon preserving the declaration as a distinct proceeding; but where the claim is for a debt, or substantially for a liquidated demand in money, or arises upon a written security or a simple contract, they in effect unite the writ and declaration by permitting a special indorsement of the particulars of the claim to be made upon the writ, under which the plaintiff may, in case of non-appearance by the defendant, at once sign final judgment and issue execution, upon which judgment no error can be brought. This proposition is directed to the same object as we have already advocated in reference to undefended causes.

If the defendant appears and resists the claim, it is proposed

that the plaintiff shall proceed to state his cause of action in a substantial shape. They say—

“What we propose is, that the necessity for the form be absolutely done away with, and that every declaration and subsequent pleading which shall clearly and distinctly state all such facts as are necessary to sustain the action, defence or reply, as the case may be, shall be sufficient, and that it shall not be necessary that the facts should be stated in any technical or formal language or manner, or that any technical or formal statements should be used; and that judgment shall in all cases be given according ‘to the very right of the cause and the matter in law appearing on the pleadings,’ and that no formal or technical defect, imperfection or omission, default in form, or lack of form, shall invalidate the proceeding. To give effect to which principle we further propose that, except in the cases more particularly specified presently, no pleading shall be deemed insufficient for any defect upon which objections can now be taken on special demurrer only.”

This recommendation is, we believe, calculated to meet the difficulty which has arisen from the existence of special demurrers, by which the ingenuity of pleaders is exercised to detect formal errors of the most minute description, and the courts, upon the argument, give effect to this fatal ingenuity by turning the parties round upon points entirely beside the merits of the real question in dispute. When a court has become so destitute of judicial astuteness as to be unable to know that “the year 1845” meant the year of the Christian era, and has compelled the parties to incur all the expense of pleading and argument afresh because of the omission of the words “of our Lord,” it is high time for the legislature to interfere and prevent the occurrence of such gross outrages upon common sense. This is no hypothetical case, it will be found in the Reports, and serves as a single specimen of a large class of decisions—*ex uno disce omnes*. According to the method now proposed, all fictitious and needless statements in pleadings, express colour, and the whole jargon of the pleader’s precedent book—is to be discontinued, and, if inserted, it may be struck out by a judge upon such terms as he may think fit.

“While, however, we think it necessary to get rid of all requirements of a merely formal character, it must be obvious to every one that some rules are absolutely necessary for the attainment of what has been shown to be the proper object of pleading. A power must exist of compelling parties to be clear and distinct in their statements, and there must be a remedy against ambiguity, whether intentional or not.”

This part of the suggestions will, we foresee, lead to great opposition in the present temper of the public upon such matters.

With every desire to see a rational simplification introduced into our courts of justice, and to abolish all the unmeaning farrago of words which serve only to perplex jurors or mystify suitors, we still think that the propositions of the contending parties ought to be set forth logically, and, if logically, they must be clearly and distinctly stated. If the parties are required to state all the facts necessary to show a cause of action or defence, such a provision as is here recommended is of course required. But it is the opinion of many persons, whose judgment and experience are entitled to considerable weight, that less particularity and detail ought to be demanded, at all events from plaintiffs in stating their cause of action. A system of claims, similar to those which have been recently introduced in equity, is suggested for the assertion of legal demands. Such a mode might perhaps offer some advantages over that proposed by the Commissioners. But we think that, upon the whole, it is right that a plaintiff should state, in some shape or other, every material fact which it is necessary for him to prove, in order to give the defendant information as to what he has to meet, and that the substantial details of the cause of action should be set out. If the judges will give effect to these recommendations by looking to the substance rather than the form of the pleadings, we feel assured that no great difficulty will arise from their adoption.

• For the purpose of providing against uncertainty, duplicity and argumentativeness in pleading, the Commissioners have had to decide between different modes of proceeding, each of which is directed to the prevention of the unlimited use of special demurrers. That which they have selected seems sufficiently simple, and calculated to effect the desired object without inflicting any serious expense or failure upon a party who is willing to deal fairly with his adversary. If a party objects to a pleading upon any of the above grounds, he may take out a summons before a judge, specifying the defect complained of. If the judge decides against the objection the pleading stands, and his decision is final. If he thinks it ought to be amended, he is to order it to be amended. If this order is not complied with, the party objecting is to be at liberty to demur on that single ground of objection, and the court is to decide the demurrer against the party objecting, or is to order the pleading to be amended. Upon this judgment no writ of error is to lie. This seems a reasonable mode of proceeding. The probable effect of these improvements is thus stated :

“ To hold that a pleading is bad because more or less obscure, seems unreasonable, unless the party pleading will not amend and clear up the obscurity when it is pointed out to him. The application

to a single judge, by summons, is attended with very trifling expense, and we hope will, at a future time, be still less expensive. The judgment of the judge will not be final as to the result of the cause. If he decides against the party complaining, he only compels him to answer the pleading as it stands. If he decides against the party pleading, his decision is not final, if the party thinks fit to refuse to amend. In truth, we believe the actual appearance before the judge will seldom take place : at least in cases where the parties mean fairly."

Among the unnecessary statements which are to be no longer required, is that of profert of a deed produced by the party suing upon it, and the necessity of setting out the deed upon oyer by the party charged upon it is also done away with. A power of inspection and of requiring a copy is substituted in such cases. We call particular attention to the following excellent remarks made by the Commissioners in reference to this subject.

" Whether a party be entitled to such inspection in courts of common law is always a question of doubt : and, except in policy causes, these courts exercise a very uncertain jurisdiction on the subject. *We think that wherever inspection of any document can be had by a bill of discovery, it should be obtainable in any court of common law where the suit is pending, and we have recommended that provision should be made to that effect.*"

We see no reason why this should be limited to cases where a bill of discovery could be filed. The court in which the action is brought should in all cases be enabled to compel inspection of any written document, the contents of which are material to be proved at the trial. A clause to the effect above suggested has been introduced in the bill for the amendment of the law of evidence, which is now before parliament, and we are inclined to think it will be found to be the most practically useful of all the provisions of that measure. The great use of discovery, as a means of eliciting truth, is most ably stated in Lord Langdale's judgment in *Flight v. Robertson*, 8 Beav. 34.

The same general mode of traversing and stating special defences is proposed to be permitted to defendants as is allowed to plaintiffs in declaring or replying. The cumbrous artifice of a special traverse is to be discontinued,— new assignments, although still permitted, are to be confined within limits required by reason and good sense. Whatever number of pleas a defendant may plead to one cause of action, there is to be only one new assignment at that time. If a defendant, by his new pleading, obliges the plaintiff again to new assign, he may again plead a single new assignment, and so on *toties quoties* at each stage, until an issue is raised. Several counts and pleas may still be allowed, as at present; and, in addition, a similar liberty

is to be given to reply, rejoin, &c., several matters by leave of the court; and a party is to be able to plead and demur at the same time and to the same pleading. These are very extensive changes, and will probably prevent the recurrence of much of the injustice which has been hitherto felt.

The abolition of the technical forms of action is strongly recommended by the Commissioners. Indeed this effect will, in all probability, result as of course from the previous suggestions, and we see no reason for retaining fine drawn distinctions which serve little other purpose than to perplex and embarrass plaintiffs.

Some very important amendments with reference to the joinder of parties to actions are next to be observed. The difference at present existing in this respect between actions of contract and of tort is well known, but it is very difficult to support the distinction by any sound reason. This distinction the Commissioners propose to sweep away, and to enact that "the joinder of too many plaintiffs be not fatal to *any* action, but that the plaintiff or plaintiffs entitled may recover;" and on the other hand, "where too many defendants are joined in an action on contract, the plaintiff shall be entitled to recover against such defendant or defendants as appear to be liable, and that the other defendants shall be acquitted."

"As to the non-joinder, we propose that the non-joinder of a person as plaintiff in an action on contract shall be amended at the trial by the judge as a variance, if it shall appear to him that such non-joinder was not for the purpose of obtaining an undue advantage, and that injustice would not be done by amending, and the omitted party consent to be joined as a co-plaintiff."

The defendant may, however, prevent such an amendment being made by serving a notice to that effect at the time of pleading. Claims by a man and his wife for injuries to her may be joined with claims by the husband in his own right.

We may pass over very briefly the subsequent steps in a cause up to the time when issue is joined. The time for pleading is extended and made uniform in all cases, rules and notices to plead are abrogated, and the necessity of counsel's signature to special pleadings is to be no longer required. If the defendant suffers judgment by default, that judgment is to be final in all cases where the demand is liquidated, and thus the rule to compute is abolished in all such cases. Where the demand is unliquidated, but is substantially a matter of calculation, a judge may substitute a computation by the master for the writ of inquiry which is now requisite. The issue is to be made up and delivered as at present, and notice of trial is still to be given to the defendant, but an uniform period is prescribed for all notices

of trial. Some material alterations are recommended in the process for summoning the jury. At present, two writs issue to the sheriff, the *venire* and the *distringas*, under which he is supposed to summon a jury to try each of the causes. In fact the jury panel is summoned quite independently of these writs, the sole advantage of which, as stated by one of the witnesses examined before the Commissioners, is, that the under-sheriff gets paid for summoning the jury. These writs are proposed to be abolished, and in lieu of them a copy of the jury panel is to be annexed to the record; thus retaining the substance without the useless form of the existing proceedings.

With respect to special juries much dissatisfaction has been felt at the present practice, which, besides being very expensive, requires in some counties a very large number of special jurymen to be in attendance during a great portion of the assizes. This must almost inevitably result as long as a distinct special jury panel is returned for each cause. The object of having the cause tried by a different class of jurors would be as well effected by a single special jury panel as by many; and as a far less number would thus be summoned, expense would be spared to parties as well as personal inconvenience to the jurors. With this view the Commissioners propose—

“That, in all the counties except London and Middlesex, a precept shall be issued to the sheriffs, directing them to summon a number of special jurymen—say forty-eight in large counties, where many special jury causes are tried, and a smaller number in the other counties; and that the persons so summoned shall be the jury for trying all the special jury causes at the assizes.”

This system, as originally proposed, was to have extended also to London and Middlesex, but in deference to a strong opinion advanced by many competent persons against such an extension, the limit above mentioned has been adopted. With this restriction we fully concur, as, considering the number of special jury causes usually tried at Westminster and Guildhall, it would be unreasonable to require the attendance of forty-eight merchants and bankers during a week or ten days. The method by which the twelve men who are actually to be in the box would be selected from the panel is not distinctly pointed out in the Report, but the plan suggested by Mr. W. H. Palmer, a most experienced under-sheriff, appears to us to be very feasible and open to little objection. He advises that no actual challenge should take place at the assizes, as such a course is always looked upon most unfavourably, but that the parties should attend at the sheriff's office in town, and reduce the list of forty-eight jurors to twenty-four, which should be returned as at present as

the panel to try the particular cause. This plan would in effect give to each party every advantage which he at present possesses. The only objections raised to these alterations in the mode of procuring a jury are that the under-sheriff's fees will be diminished; but we cannot think that the loss to any one class, however deserving of consideration, ought to weigh against the benefit which the public will derive from an improved system of procedure.

The proceedings at the trial are to form the subject of a separate Report. Before we proceed to the remaining matters reported upon, there is one suggestion to which we must advert as affording a very cheap and valuable means of raising dry legal questions or simple issues of fact between litigant parties.

"With a view to facilitate parties who desire to raise questions so agreed between them to be decided without pleading, (?) we propose an extension of the provisions of the recent act, by which parties were enabled, after issue joined, to state facts in the form of a special case by consent for the opinion of the court, and to agree that judgment might be entered for the plaintiff or defendant by confession or *nolle prosequi*. * * * We propose that disputed questions of fact may, by consent, be stated for the determination of a jury without pleadings."

This paragraph, although somewhat ungrammatical, sufficiently points to a most important alteration. This mode of raising questions of law by consent has been adopted in the courts of equity under Sir George Turner's Act, and has been applied in the case of appeals to quarter sessions under Mr. Baines's Procedure Act, and we venture to predict that this kind of special case will be extensively adopted in practice. The mode of at once raising issues of fact is similar to that employed under the Interpleader and Tithe Acts, and may be effected through the machinery prescribed by the recent statute for abolishing wagers and giving a simple form of feigned issue in all cases.

The subject of Execution is next discussed in the Report. The principal grievances which exist in this part of the present system are, first, the indefinite duration of unexecuted writs of execution; and, secondly, the want of authority in an attorney to discharge a prisoner detained under a writ of *ca. sa.* Writs of execution are operative from their date and remain in force until executed; and it has become a serious inconvenience to sheriffs to have to carry forward all unexecuted writs, so as to ascertain before executing any new writ which may come into the office whether there may not be an old writ outstanding against the same person. It may occur that the plaintiff who issued the former writ has given up all notion of ever getting

paid, or the debt may have been discharged between the parties. In either case the sheriff is put into a difficulty; if he seizes any goods which there may be, he must apply them to the first execution if not satisfied, and it may often, from lapse of time, be next to impossible to ascertain whether it has been satisfied or not. The proposed remedy for these inconveniences is to limit the duration of such writs to a year; but in order to enable an active creditor to preserve his priority, a mode is provided of keeping a writ alive by affixing to it, while in the sheriff's hands, a seal indicating the date of its renewal. The other inconvenience applies only to writs of *ca. sa.*, which are the *ultimum remedium* to which a plaintiff can resort to enforce payment of a debt. If the debtor is discharged from custody under such a writ he cannot be retaken, but the debt is gone. For this reason an attorney for a party is not invested with authority to discharge the opposite party out of execution under a *ca. sa.* The client himself must expressly authorize the discharge; whereas in execution against goods the attorney is fully competent to put an end to the possession under the writ. Hence, say the Commissioners,

“ It follows that the sheriff is never safe in setting a debtor at liberty on any authority except that of the creditor himself, who may be abroad, but may have left authority to his attorney to act for him, and the attorney may have arranged with the debtor beneficially for all parties. In such a case the debtor must be kept in prison, unless the sheriff will trust to the honour of the parties concerned. We propose to remedy this: but as a discharge by the creditor's authority from custody on a writ of execution is a satisfaction of the debt, we think the authority should only be binding so far as the sheriff is concerned, leaving it to the parties to contest the right of the attorney to give the discharge.”

Connected with execution is the subject of the revival of judgments. At present a judgment is presumed to be satisfied unless execution is issued upon it within a year and a day, and, in order to enforce it after that period, it must be revived by a writ of *scire facias*, a proceeding in the nature of an action, and of a tedious and expensive kind. It is proposed by the Commissioners to extend the period during which a judgment shall remain in force to six years, by analogy to the statutes of limitation, and, in those cases in which it is necessary to revive a judgment, to effect it by a speedier mode of entering a suggestion upon the roll by leave of a judge or of the court, upon which execution may issue. This mode of reviving and enforcing judgments is borrowed from the course of proceeding under the Joint Stock Companies' Act, where it appears to have worked successfully.

The last point connected with ordinary actions relates to motions in arrest of judgment, or for judgment non obstante veredicto. The injustice of permitting a party to pass by an objection in point of law by pleading over, and then, after the verdict of the jury has been given against him, to question the sufficiency of his adversary's pleading, is fully pointed out. Not only are costs needlessly incurred by this means, but the possibility of amending the defective statement is denied at this late stage of the proceedings. At the same time it is just that a party should have a right of contesting the legal sufficiency as well as the truth of his adversary's statement, but he must do so at such a time and in such a manner as will produce no injurious results to the opposite party. The reasonable terms upon which such motions as these should be permitted, are the "payment by the party moving of all the costs occasioned by the trial of the issue, or other proceeding arising out of the defective pleading." This is what is proposed by the Commissioners, and in addition they recommend—

"That the court shall make all such amendments as appear either by the judge's notes of the trial or other satisfactory proof, to be justified by the facts of the case. And that upon such motion, founded on the non-averment of some alleged material fact or facts, or material allegation, the party whose pleading is said or adjudged to be defective shall be at liberty to show that such facts were proved or admitted at the trial, or may be allowed to suggest the truth of the omitted fact or facts."

This suggestion, if made, is capable of being traversed and tried like any other fact, and the judgment will be entered according to the finding. This power of amending the pleadings at any stage of the cause we look upon as a very useful alteration. Its adoption is recommended in the most general terms, at all times and in any proceeding, whether there be anything in writing to amend by or not, and whether the defect or error be that of the party or not. Such an enactment, if passed, would, we trust, be sufficiently large to include the case of special verdicts, in which the failure to have upon the record an express finding of a fact known to both parties has not unfrequently caused the whole proceedings to be abortive and useless. Some simple method of preventing so glaring an injustice might be easily discovered.

After some simplification of the proceedings in error, and taking away writs of error in cases where the objection has been inadvertently or otherwise passed over in an earlier stage of the proceedings, the Report adverts to the practice in Eject-

ment. The nature of this proceeding, and its merits and defects, are clearly and succinctly stated. A new method of procedure is suggested, which, while it keeps clear of the fictions which encumber this kind of action, has for its object the determination of the question of title alone. Such a recommendation is highly desirable, because we know of scarcely any branch of legal procedure which has been more virulently attacked by nonprofessional objectors than the fictitious parties and statements which form the groundwork of this action; and yet it would be difficult to point out any action in which the real rights of parties are in fact more easily and satisfactorily litigated. But as the world at large are apt, and not improperly apt, to form a judgment from what meets the eye, rather than to search deeper for intrinsic merits, it is desirable that all appearances which offend should be discarded, so that the real advantages of the proceeding may be more clearly discerned. The Commissioners recommend the substitution for the service of the declaration, of a simple writ, to be directed to all parties in possession of the property sought to be recovered, requiring them to appear within a fixed period and defend their possession, with a notice that in default of such appearance they will be turned out. This writ will contain the names of the persons claiming the property, and, upon appearance of the defendants, an issue is to be made up at once, without any pleadings, upon which the parties are to proceed to trial, the sole question being "whether the statement in the writ of the title of the claimants is true or false, and, if true, then which of the claimants is entitled." If no appearance be entered, or if the defence be limited to part only of the property, the party whose title is asserted in the writ will be enabled at once to sign judgment for and recover possession of the whole or part of the property. It is plain that this substituted proceeding may without difficulty be moulded so as to meet the cases of a landlord defending, or of one joint-tenant or tenant in common suing another for a share of the joint or common property. In the latter instance there would be an additional question to be tried, viz. whether an actual ouster had taken place by the party in possession.

The Report concludes with some very important suggestions upon the subject of fees now paid by suitors to the officers of the court who assist ministerially in the administration of justice, and to the clerks of the judges who perform similar services at their chambers. This subject was strongly pressed upon the Commissioners as a grievance requiring the earliest possible remedy. These fees have been a cause of complaint in all quarters, and not without justice, whether we consider the

large amount paid, or the impropriety of making the administration of justice the subject of payment by the individual suitor. Much very valuable evidence on this head will be found collected in the Appendix. By a report to the House of Commons in 1847, it appears, that, in that year, the receipts of twelve of the judges' clerks amounted to no less a sum than 22,558*l.* 6*s.* 4*d.*, and that the clerk to the vacation judge has received as much as 2000*l.* in six weeks! The items of fees received by the associates in London, and on some of the circuits, are also stated in the Appendix. To this evidence we refer our readers for more information on this subject; in many instances the amount paid is utterly disproportionate to the service performed. All persons, including these officers themselves, unite in a common opinion that any payment by fees is objectionable, and that a salary would be far preferable. Such a mode of remuneration by salary has been already applied to many of the offices in the superior courts, and has, we believe, given universal satisfaction. It is now proposed to extend this principle to all such offices. But a further question is also raised. When the former alteration took place the fees were not abolished, but any surplus beyond the salaries is paid over to the Treasury. It is recommended, and the recommendation is one which we earnestly hope will be adopted, that the general funds of the country should bear all the expense of the establishments of the courts. Besides the direct benefit to the particular suitor, every member of the community derives an indirect benefit from the existence of courts of justice. He gets his debts paid without going to law, by the knowledge on the part of his debtor that the court is there by which payment would be enforced if necessary. All are, therefore, interested, and the support of the whole staff, officers as well as judges, would be properly charged upon the consolidated fund.

Other recommendations are made by the Commissioners, with which we entirely agree. The office of marshal and associate in town is to be held during good behaviour, instead of the officer being removable by each chief judge on his elevation to the bench. In like manner, a permanent staff of clerks are to transact the business ordinarily performed at chambers, which requires considerable experience and knowledge. In effect, the same clerks are at present generally continued by succeeding judges. The proposal is to make them irremovable except for good cause, and so to have a greater chance of securing an efficient body of persons acquainted with the routine of chamber practice. The office of judge's marshal on circuit has also been considered. While we fully agree that it is desirable

to retain such an assistant to the judge, we doubt whether, considering his duties and the ordinary mode in which the office is filled, any salary need be assigned to him. It seems to us that it will always be a sufficient inducement to young men about to enter upon the profession, to have the benefit of the society of judges, and the advantage of learning the practice of courts of assize, and of being introduced to professional life under such favourable auspices. As the marshal, during the circuit, travels and lodges with the judges, he is put to no expense, and his duties are hardly so onerous as to call for any greater remuneration.

We have deferred up to this point the consideration of a question upon which there appears to be a difference of opinion among the members of the profession,—we mean the propriety of retaining pleadings or written statements by the parties of their respective causes of action or defence. Into this question the pamphlet by the Chief Justice of Bombay, now lying before us, chiefly enters, and as it expresses an opinion at variance with that entertained by the framers of the Report, we propose to contrast the arguments of each in this particular. Sir Erskine Perry, founding himself upon the practice in the courts in India, broadly advocates *the total abolition of special pleading* in all cases, and in lieu thereof would substitute a system embodying the following principles:—"1. Summons with notice; 2. Early appearance of the parties before the judge; 3. Power of mutual discovery; 4. Oral pleadings recorded by the officer of the court; 5. Judgment moulded by the court to meet the facts of the case." To four out of these five elements of his system we give our full assent. They are in effect what we have already pointed out as completing the alterations proposed by the Commissioners. From the remaining proposition, which we take to be the essence of the whole, that of oral pleading, we entirely disagree. The necessity for some preparatory statement by the parties, either oral or written, either by way of mere notice or a more complete disclosure of details, is admitted upon all hands. It is upon this necessity that the author of the Letter rests his conclusions. He assumes

"That the ends of justice, as well as the tendency of public opinion at the present day, imperatively require that there shall be nothing like concealment, keeping back of the truth, or attempts at surprise amongst litigant parties, and that the object to be aimed at by the judges in framing their rules of procedure is to enable suitors to bring the facts, all the facts of their case, in the speediest and fullest manner before the court."—Letter, p. 14.

This position will not be controverted. It can only be in

matters of trivial moment that some previous disclosure between the parties of the matter in dispute can be dispensed with. There will always be complicated and simple cases arising in our superior tribunals, and any system which is devised must be adapted to the complicated as well as to the simple class. It is a fallacy therefore, in deciding upon one uniform course of procedure, to extend to every kind of case a method which may properly be applied to those questions, and to those alone, which are of small moment. Let the latter class be defined, as at present, by a known limit, and entrusted to the more summary decision of a local court. In the superior tribunals there must always be clear statements advanced on each side of the question in dispute.

Should then these statements be verbal or ought they to be reduced to writing? Sir E. Perry admits that in the higher class of actions "the advantages afforded by carefully *written statements* should be available to the parties;" and it is abundantly clear, from a reference to the Year Books, that a system of oral pleading is ill adapted to a speedy or accurate determination of a dispute. Such a contest inevitably leads to quibbles, verbal criticism, and minute objections. It resembles a disputation in the schools, more than the conflict of logical propositions. In truth, as lawsuits increased and more complicated transactions became the subjects of litigation, it was soon found impossible to retain the old mode of pleading *ore tenus*. Written statements on each side were of necessity substituted. The error committed was, not in substituting written statements, but in introducing into them all the technicalities and forms which were required to confine within proper bounds the verbal allegations of the parties.

It is possibly true that a system of special pleading is inapplicable to India. So says Sir E. Perry, and upon that question we should defer much to the opinion of the Chief Justice of Bombay, although we collect from his pamphlet that different views are entertained by Sir Lawrence Peel, who fills a similar office at Calcutta. But, be that as it may, we consider that it would not be advisable to abolish special pleading in England, but to render it subservient to its proper uses—the development of the precise point in controversy, and the presentation of it in a shape fit for decision. "The substantial rules of pleading," according to Lord Mansfield, whose authority is cited in both the publications before us, "are founded in strong sense and in the soundest and clearest logic, and so appear when well understood and explained; though, by being misunderstood and misapplied, they are often made use of as instruments of chicane."

Let all misapplication of these rules be prevented, let all possibility of using them as instruments of chicane be removed, and their value will not fail to be recognized, and the advantage of the system generally acknowledged. We see no reason why any existing defects may not be obviated by amendments of the kind suggested in the Report. At all events the necessity for *abolishing* special pleading is not made out.

The only remaining question is, whether the pleadings in a cause should be prepared by the parties themselves, or settled by an officer of the court from the verbal statements made by them to him. To the latter branch of the alternative we collect that Sir E. Perry inclines. Like other advocates of this proceeding, he refers to the practice in the Roman law of the parties appearing before the prætor, who, after hearing their allegations *ore tenus*, drew up the *formula*, according to which the disputed issue was to be tried. But we think it plain that such a course of proceeding, however well adapted for the decision of rights in the time of the Emperors, would be found utterly defective in the present state of society. We agree with the Commissioners, that the settlement of pleadings by an officer of the court would be highly inconvenient. Their reasons for this conclusion are well founded.

“ We do not think it at all likely that such an officer would perform his duty better or more satisfactorily than the present private pleaders, who, being directly retained by their clients, are naturally actuated by more zeal and anxiety for their interest than a mere public officer would be. To ascertain and state the disputed point, whether of law or fact, is the aim and object desired, and surely this can as well be done by one party stating his case and the other answering it, as by a third person taking the statement and answer, and dealing with them as an assessor or moderator.”

In addition to these considerations, it is deserving of attention, that by such a plan the expense would be greatly increased. Not only would a greater staff of officers be required, but the parties would generally consult a pleader before laying their case before the officer, and would not unfrequently attend with counsel before him on disputed questions of form. The payment of pleaders is at present extremely moderate, and we are convinced that in no view would it be expedient to cast the duties now performed by them on a salaried officer of the court.

We have now, we fear too cursorily, given an outline of the contents of this Report. If time had permitted a more complete dissection of its contents we should have been better satisfied,

but we trust that our preceding remarks will suffice to direct the attention of our readers to the blue-book itself, which is worthy of a careful perusal. That its suggestions will give rise to very divided opinions we cannot doubt. It was obviously impossible that all classes of objectors should be satisfied. Although we think that some of the recommendations fall short of what is required, yet upon the whole what is proposed is a step in the right direction, and we are not disposed to quarrel with a good move merely because it does not go far enough. Much of the benefit which will result from any such code of pleading and practice will depend upon the way in which it is carried out by the courts and judges. What we desire is the combination, so far as is possible, of theoretical completeness and practical efficiency. But the latter is the more important element, and the former must give place to it if necessary. Happily there are at the present time lawyers of enlarged minds, and averse to technicalities, who occupy the bench of the superior courts, and we have every reason to hope that we may welcome a new era in our judicial system; that the substantial merits of every question will be discussed disembarrassed of any of those forms and technicalities which have hitherto brought such obloquy upon the practice of our courts of justice. If the recommendations of the Commissioners are adopted by the legislature, the result will be, that suitors will have recourse to the superior courts instead of carrying their complaints to inferior tribunals, which, however competent be the judges, or efficient the system there pursued, cannot enter into competition (except in trivial cases) with courts presided over by the ablest lawyers which the country can produce. It is idle to suppose that the public will be content with any but the best law, if it can be procured without ruinous expense. Considerable expense must, and always will be incurred in the prosecution of any contested right. It is a mistake to apply the favourite principle of the day, the procurement of everything at the cheapest possible rate, to the administration of justice. A reasonable diminution of cost is what suitors are clearly entitled to, but they will sooner or later discover that, beyond this point, any cutting down of expense will be productive of positive loss.

H.

ART. IX.—THE NEW COUNTY COURT RULES.

EVERYTHING tends to enhance the importance of the County Courts. Public opinion, the press, Lord Brougham, and parliament, and all the other great organs of change in this country, seem to combine their efforts to make these courts the general arbiters in litigation, and to invest them with every kind of legal and equitable jurisdiction.

The bills now and lately before parliament are not the only proofs of this. We have a preliminary sample of the same intention in these New Rules, which, with exceedingly scanty notice to the country, have just come into operation. They are the result of the labours of five of the County Court judges—Serjeant Dowling, Messrs. Brandt, Espinasse, Gale and Furner,—in accordance with 12 & 13 Vict. c. 101, s. 12; and having been approved by three of the judges at Westminster, have become law, and *supersede* all the rules hitherto in use under 9 & 10 Vict. c. 95, s. 78.

They are certainly an improvement on the old rules; nevertheless they exhibit in some instances a desire to increase rather than lessen the already redundant power of the judge, and also some errors, which a little more care in revision would have avoided.

We purpose commenting on all the more important rules.

Rule 2 requires the judges to appoint, after January 1st, 1852 (why not sooner?) the court days and hours for three consecutive months, and thenceforth of each following month three months beforehand. There is no kind of practical necessity for this, to announce them for each month fourteen days beforehand would answer every purpose.

Rule 5 secures costs when infants sue by means of "next friends," for which they are made responsible. This is a good rule.

Rules 6—17 define, and more stringently determine, the clerk's duties; and are on the whole useful.

Rule 10. This rule appears to be oddly framed; the meaning is doubtless to apply the *EXCEPTION* to the assistant clerk, or clerks, provided by him, but it also seems to extend to the chief clerk.

Rules 18—24 particularize and enlarge the duties and responsibilities of high bailiffs. High bailiffs are occasionally a little above their work; and it is a salutary regulation that

they shall in all cases of absence account for it, and enter the cause in the minute book at the succeeding court. He is also to send to the clerk a statement of all the summonses served eight days before the day of trial, and he is required to account minutely and frequently for all monies that he has received, and of what has been done under every process issued to him. They tend to increase his accountability rather than his work.

Rule 25. Every kind of suit is now to be called a *plaint*; and to such an extent is laxity to be carried, that "if the plaintiff is unacquainted with the defendant's christian name," it may be omitted, and he may be sued "by his surname, or by it and the *initial* of his christian name."

How this initial is to be arrived at in case the name itself is unknown, will, we fear, puzzle the country clerks sorely. Perhaps the judges will illumine them. But the suing of "Smith" or "Brown," is not greatly mended in precision by prefixing peradventure the letter J! If no Brown or Smith appears, the same proceedings under section 79 and 80 may be taken as if the true name, &c. had been stated, and all subsequent proceedings (commitment included) thereon may be taken in conformity with such description.

Rule 26 goes in the same direction. Claims by husbands in their own right may be joined with claims in respect of which the wife must be joined as a party, i. e. distinct parties and causes of action in the same suit!

Rule 27. A good one, requiring as many copies of particulars to be delivered as there are several defendants.

Rule 28 also provides for full particulars of the breaches of covenant, on which suits are brought to recover penalties under the 8 & 9 Will. III. c. 11.

Rule 38 requires that the judge shall, before leave is granted to issue a summons out of the district, be "satisfied by statement on oath, that the party applying has a cause of action." This is a change from the 60th section of the act. At the same time, it will be convenient that he should ascertain whether it arose within his district, or whether the defendant resided there within the preceding six months, as this requirement is not superseded by the new rule. The judge ought not any longer to delegate this duty to the clerk.

Rule 43 further defines the service of summons, and the succeeding ones prescribe how it shall be served in several special cases.

Rule 53 enlarges the already extraordinary powers of the judge, and permits him to proceed even though he be not satis-

fied that the summons has come to the knowledge of the defendant ten days before the hearing, and in his absence.

Rule 62. This rule requires the defendant, when he pays money into court, *before* the return day of the summons, to pay the fee for *notice* of payment to the plaintiff. At the end of the table of fees, the "notice of payment into court" is without any qualification stated to be a fee "payable by the plaintiff." This fee is however made payable by defendant *before* the return of the summons.

Rule 117 authorizes the deduction of this fee from the plaintiff, on all payments after order.

Rule 65 is an exceedingly good one, and disallows expenses of proving a document wherever the parties proving it have not availed themselves of the powers the rule gives of serving notice on the other party to inspect and admit it. The judge may adjourn the trial, moreover, to give time to do so. This will much facilitate the proof of such documents.

Rule 66, with equal propriety, provides facilities to plaintiffs to abandon suits, without further costs, after notice to defendants.

Rule 67. Where notice of set-off or of other defences has not been given, the omnipotent judge may adjourn the case, should the plaintiff refuse to allow the defendant to go into such defence then and there!

The following is a new rule :

Rule 74. "Where the defence is a tender, such defence shall not be available unless, before or at the hearing of the cause, the defendant pays into court (which may be without costs) the amount alleged to have been tendered."

The distinction between tenders and payment into court differs now only as regards the costs.

The following is another tolerably plenary power in the hands of Messieurs les Juges !

Rule 86. "Where *anything* required by the practice of the court to be done by either party, *before or during the hearing*, has not been done, the judge may, in his discretion, and on such terms as he shall think fit, adjourn the hearing, to enable the party to comply with the practice."

Rule 89 enacts, that

"No attorney shall be allowed to appear for any person in a county court, until he has signed a roll or book, to be kept by the clerk for that purpose, but no fee shall be payable for that purpose."

This is rendered quite useless by the precious amendment in

the new bill about to pass, that counsel, attorney, or any one else, may appear for any party to any suit.

The powers of amendment, their extent and importance, may be judged of by the following specimens :

Rule 94. "Where a person other than the defendant appears at the hearing, and admits that he is the person whom the plaintiff intended to charge, his name may be substituted for that of the defendant, if the plaintiff consents, and thereupon the cause shall proceed as if such person had been originally named in the summons, and, if necessary, the hearing may be adjourned on such terms as the judge shall think fit, and the costs of the person originally named as defendant shall be in the discretion of the judge."

Rule 104. "Where at the hearing a variance appears between the evidence and the matters stated in any of the proceedings in the county court, such proceedings may, at the discretion of the judge, and on such terms as he shall think fit, be amended, and such amendment, as well as amendments as to parties, when ordered, shall be made in open court, and during the sitting of the court."

If the judge finds there are too many defendants or plaintiffs, or too few of the latter, the judge by a stroke of his pen can increase or lessen them accordingly, and proceed as usual, to use the words of Rule 101, "as if the proper persons had been originally made parties."

Not only is the judge to have all kinds of power to do all manner of things, but he is required and compelled, as we read Rule 107, to interfere and "order" even in minor matters hitherto left to the discretion of the clerk; *ex. gr.*—

Rule 107. "The judge *shall in each case* direct what number of witnesses are to be allowed on taxation of costs, and their allowance for attendance shall be according to the scale in the schedule, unless otherwise ordered, but shall in no case exceed the allowances therein mentioned."

Rule 111. This rule provides that the costs of "*unproductive*" warrants against the goods shall *not* be allowed against the defendant, unless, &c.

Rule 113 says that the costs of *executed* warrants shall be allowed, unless, &c.

Now a warrant may be executed, though perhaps unproductive, by reason of claims for rent, &c., after bailiff has been in possession three or four days.

Rule 124. This rule, as to concurrent executions issuing into different districts, may work great hardship on a defendant. It is possible that a debt and costs may be levied in two or three places by different high bailiffs. If so, how is the defendant to obtain redress for the damages he may sustain?

The costs of witnesses, whether they have been summoned or not, or examined or not, are to be allowed, if the judge thinks proper. We quite agree with the learned County Court judge, whose appreciation of his jurisdiction was so accurate, that when he received a prohibition signed by Mr. Justice Patteson, he exclaimed, "Oh, I don't mind that; Mr. Justice Patteson does not half know what my powers are!" We firmly believe he does not, and we also believe that the three judges, who signed these New Rules, are much in the same state of blissful ignorance.

Here is a difficult requirement to observe.

Rule 129. "Concurrent or successive summonses for commitment may be issued in the same district or in different districts by the several courts thereof, provided that in no case shall a summons for commitment be issued, except by the court of the district wherein the party summoned then dwells or carries on business; and the costs of more than one summons shall not be allowed against the other party, unless by order of the judge."

How is the clerk to the court, who issues the summons at his office, to ascertain whether the defendant lives in the district or not, and what is meant by concurrent summonses which are only to go to one district? The useful thing would be to allow them to issue *together* for *several* districts, so as to catch a defendant who was shifting his residence to evade it; and it is difficult to see the possibility of any hardship in it, the costs being allowed only for one summons.

Rule 130. "When a defendant does not dwell or carry on business in the district of the court, to which he has been summoned to appear to a plaint, he shall not be liable to be committed at the hearing of such summons, whether he appears to such summons or not."

This rule simply makes doubtful what the act made plain. It fails to specify *when* the defendant must so reside, &c., to make the summons available.

Rule 139. This rule is intended to facilitate payment to plaintiffs of the produce of their summonses issued into foreign districts; but in very many courts the clerk may not have "*any money in hand*" whereout to pay the *amount certified*, and he can scarcely be expected to advance the money out of his own pocket, so that this rule may in numerous instances delay the plaintiff rather than otherwise.

Much extra trouble is imposed on the clerk of the court with regard to the accounts which he will be compelled to keep. The mode pointed out for keeping the *cash book* and *ledger*, and the forms of entries given by way of example, are likely to create

great confusion, and render it extremely difficult, especially in courts of large business, to adjust the balances.

It may appear over punctilious to criticise the forms in the appendix; but they are drawn up with such extreme carelessness, that we cannot help giving one or two examples. In the form of commitment after judgment, the court is made to say that it has been proved to the judge's "SATISFACTION" that the defendant has not answered to his "*satisfaction*," among the other grounds of commitment.

In the summons to appear after judgment, the defendant is told that, if he does not appear at the hearing, he may be committed to gaol. Now the plain inference is, that if he does appear he will not be committed; and it seems a very awkward thing, if not a very unfair one, after such notice to imprison him on other grounds.

There is urgent need for the revision of these Rules, which, with a little more pains, may be made very useful, and a great, instead of a partial improvement on the old ones.

Notes of Leading Cases.

EQUITY.

VENDOR AND PURCHASER—INTEREST—CONDITIONS OF SALE.

De Visme v. De Visme, 1 M'N. & G. 336.

THE case of *De Visme v. De Visme* relates to the right of a vendor to claim interest upon purchase-money, and is important as overruling the judgment of Sir John Leach, V. C., in *Esdaile v. Stephenson* (1 Sim. & Stu. 122).

Where a time is specified for the completion of a contract, but the contract is not completed within the specified time, there equity, considering that as done which is agreed to be done, treats the estate as the property of the purchaser, and the purchase-money as the property of the vendor from the time fixed for the completion of the contract. Each becomes a trustee for the other. The vendor is entitled to interest on the purchase-money, the purchaser to the mesne rents and profits of the estate.

But as the rate of interest allowed by the court may exceed the value of the rents and profits, the court will in such a case consider to whom the delay was attributable, and if it be clearly made out to have been occasioned by the vendor, then, as no man may take advantage of his own wrong, the court gives the vendor no interest, but leaves him in possession of the interim rents.

Such is the general rule where there is merely a time fixed for the performance of the contract, and nothing specific is said as to the time from which interest is to run. It was followed by Sir John Leach, V. C., in *Paton v. Rogers* (6 Madd. 256), and in *Monk v. Huskisson* (4 Russ. 121); and by Lord Lyndhurst, C., in *Jones v. Mudd* (4 Russ. 118), and is expressly recognized even in *Esdaile v. Stephenson*.

The decision in *Monk v. Huskisson* carried the rule still further. The contract in that case contained an express stipulation as to interest, that if, *by reason of any unforeseen or unavoidable obstacles*, the conveyances and assurances could not be prepared or perfected for execution on the day fixed for the completion of

the purchase, the purchaser should from that day pay interest at the rate of 5*l.* per cent. on his purchase-money, and be entitled to the rents and profits of the estate. It was therefore contended, for the vendor, that the contingency of the conveyance not being perfected by the day fixed for that purpose, was contemplated at the time of the contract, and the express stipulation for payment of interest excluded the application of the general rule. But even in that case, Sir John Leach, M. R., held, that notwithstanding the stipulation, the vendor was not entitled to interest before the time when a good title was shown; the effect of the stipulation being, not to give interest when interest would not otherwise have been payable, but to fix the rate of interest at 5*l.* instead of 4*l.* per cent.

The same judge who, as Master of the Rolls, extended the rule to *Monk v. Huskisson*, had, however, as Vice-Chancellor, excluded it in *Esdaile v. Stephenson*, where the stipulation for payment of interest was, if not totidem verbis, at least as favourable for the purchaser as in *Monk v. Huskisson*. "The interest," his Honor said, "does not depend upon any rule of the court, but upon the express stipulation of the parties; and the terms of the stipulation apply to every delay, however occasioned. It is highly probable, but I cannot in reasoning assume it as a necessary consequence, that the interest must under all circumstances exceed the mesne profits, so as to infer from thence, that the true intention of the parties must have been, that the purchaser should pay interest at 5*l.* per cent. only when the delay in completing the contract was occasioned by himself. The purchaser must, under the circumstances of this case, pay interest according to the terms of the conditions of sale."

With this decision pronounced in 1822, that of the same judge, in *Monk v. Huskisson* in 1827, was directly at issue. So far, however, from being reversed by the latter, *Esdaile v. Stephenson* has been considered and followed as law. Thus, in *Greenwood v. Churchill* (8 Bea. 413), where the vendor had delayed the delivery of an abstract for more than two years, Lord Langdale, M. R., ordered the purchaser, whom he admitted to be not only innocent but to have acted in a laudable and generous manner, to pay interest at 5*l.* per cent., on the ground that he had precluded himself from seeking a variation of his contract.

Such was the state of the law previously to *De Visme v. De Visme*. There, by the conditions of sale, a time was fixed for the delivery of the abstract, and a time for the payment of the purchase-money; and it was provided, that if the money were not paid at such last mentioned time, then, *from whatever cause*

the delay might have arisen, the purchaser should pay interest at 5*l.* per cent. from that day. A perfect abstract was not delivered for upwards of a year and a half from the time fixed by the conditions of sale. The purchaser, however, set apart his purchase-money, and gave notice to the vendor. A petition by the personal representatives of the purchaser, claiming compensation for the loss sustained by the purchaser, being the difference between the amount of interest at 5*l.* per cent. and the interest at 2*l.* 10*s.* per cent. made by the purchaser on his purchase-money, was dismissed by Wigram, V. C., his Honor stating, that he considered himself bound by the cases which decided, that in a condition of that nature, where interest is to be paid by the purchaser in case of delay *from any cause whatever*, the acts of vendors are among the causes of the delay referred to. From the order of the Vice-Chancellor the petitioners appealed to Lord Cottenham, C., who held, reversing his Honor's order, that the purchaser was only liable to pay interest from the time a good title was shown. Lord Cottenham said, it was not necessary for him to determine whether the words "any cause whatever" included that which had happened, viz., the neglect of the vendor to perform his part of the contract; even if it did, the court would compensate the purchaser for the loss occasioned by the vendor's nonperformance of the contract. Where a vendor sells property under a description more favourable than properly belongs to it, the court in certain cases performs the contract, but performs it sub modo, not leaving to the vendor the benefit of his error,—not compelling the purchaser to pay in full, but only so much as appears to be the value of the property which can be conveyed to him, deducting the value of so much as he contracted for and could not obtain. This rule, continued his lordship,—this broad principle of compensation, which was universally adopted where principal was concerned, should in justice be applied to the case of interest. Assuming that upon the true construction of this contract the vendor was entitled to the interest from the time fixed for payment of the purchase-money, if he had made default in performing his part of the contract, he may not get the benefit of his own wrong, but must make compensation. No property produced 5*l.* per cent.; to pay it therefore in exchange for the rents would be a loss to the purchaser, for which, if it arose from the vendor's default, the court would give him compensation, and not specifically perform a contract with all the disadvantages that the vendor might impose upon an innocent purchaser. To hold the contrary would be to do the greatest possible injustice.

Although Lord Cottenham did not expressly determine the

ground upon which he held the purchaser entitled to forbear payment of the interest, his construction of the words "from any cause whatever" is sufficiently clear:—"When the words used are 'from any cause whatever,' they must mean some cause not provided for by the contract, the parties not considering the probability of either one or the other breaking the contract." This loophole has already given occasion to attempts to evade the decision in *De Visme v. De Visme*, by inserting in conditions of sale some stronger form of expression, which may be held to extend to the contingency of default on the part of a vendor. It is difficult, however, in the face of the judgment before us, to understand how the hope of evading its effects can be entertained. To any one who examines that judgment, it must be clear that no terms short of a distinct contract that the purchaser shall pay interest from a day certain, although prevented from performing his part of the contract by the acts or defaults of the vendor, would have been construed by Lord Cottenham to extend to such contingencies; and even if a purchaser could be found so regardless of his own interest as to bind himself by such an agreement, it would not avail the vendor, who, upon the broad principle adopted in *De Visme v. De Visme*, could not enforce specific performance without making compensation.

The first practical inference from the case before us is a caution to vendors not to presume upon any stipulation, however strongly worded, relative to the payment of interest upon purchase-money. The second is a caution to purchasers, in cases of such default by a vendor as occurred in *De Visme v. De Visme*, to abstain from setting apart their purchase-money until such time as the vendor has put himself right. As an inference from the doctrine that a purchaser is not liable to pay interest until a good title is shown, Lord Cottenham held further, that the purchaser in this case, having set apart his money at an earlier date, had done so in his own wrong; and that notwithstanding he had given the vendor notice, he must bear the loss occasioned by his money having lain idle.

De Visme v. De Visme was followed by Lord Langdale, M. R., in *Skelton v. Robinson* (12 Beav. 363), and is cited in *Monro v. Taylor* (8 Hare, 70). *Rowley v. Adams* (12 Beav. 476) will be found on examination not to affect the principle adopted by Lord Cottenham, the delay in that case having been held not to be attributable to the vendor.

PLEADING—DISCOVERY OF A DEFENDANT'S CASE, AND HOW HE INTENDS TO SUPPORT IT.

The Attorney-General v. The Corporation of London, 2 M'N. & Gor. 247.

LORD REDESDALE, speaking of the purposes for which discovery is given, says that a plaintiff may require a discovery of the case on which the defendant relies, *and of the manner in which he intends to support it.*¹ The words in italics are disputed by Sir James Wigram in his Treatise on Discovery.² "The first of these propositions," his Honor observes in reference to the passage in Lord Redesdale, "that a plaintiff is entitled to a discovery of the case on which the defendant relies, that is, that the plaintiff is entitled to *know what the case is*, admits of no doubt. The common rules of pleading make it necessary that the defendant should so state his case, that the plaintiff may know with certainty what case he has to meet; and in the strict observance of those rules a plaintiff is secure against surprise. It is at the peril of the defendant, if his pleadings are defective in this respect; but this is quite independent of the law of discovery. The second part of the above quotation from Lord Redesdale, viz., that the plaintiff has a right to know *in what manner the defendant intends to support his case*, must, it is conceived, be an inaccuracy. It is decidedly opposed to all the authorities."

The point in dispute between these high authorities was determined by Lord Cottenham in the Attorney-General v. The Corporation of London. The information in that case insisted on the right of the crown by royal prerogative to the ground and soil of the River Thames, and alleged that the corporation of London had for a long period, either by prescription or under some grant from the crown, held the office of bailiff or conservator of the river, but that they did not by virtue of such office acquire any estate or interest in the ground and soil of the bed or shore of the river. It then alleged that the corporation claimed to be seised of the freehold of such ground and soil, and had assumed to exercise acts of ownership, which were beyond their power as bailiff and conservator, and charged in the usual form of replication charges that no grant had been made, by charter or letters-patent by her majesty's predecessors, of the soil and bed of the river to the corporation; that in no charter had any immemorial right of the corporation to the ownership of the soil, bed and shore of the river, as arising from a previous grant, been recognized or confirmed; and that no

¹ Mitf. Pl. 7.

² P. 285, pl. 372.

sufficient acts of ownership, deeds, matters or things, could be shown as evidence of the immemorial usage pretended by the corporation as the foundation of their rights. The defendants by their answer denied the title of the crown, and alleged a title in themselves; and after admitting that they were conservators, and had exercised the acts of ownership alleged in the bill, insisted that they were not bound to answer the charges. Exceptions taken by the Attorney-General to the answer of the defendants were allowed by the Master, whose decision was confirmed by Lord Langdale, M. R. (12 Beav. 8). The defendants appealed to the Lord Chancellor, and contended that, although the informant was entitled to the discovery necessary to make out his own title, he had no right by a fishing bill, alleging that the defendants' deeds will not make out his right, to have a discovery of the defendants' title, and thus enable persons to pick holes in it.

Lord Cottenham, in a judgment comprising several other important points, and of which we give merely the substance, said nothing could be more clear from authority and universal practice, than that a plaintiff is entitled to discovery, not only of that which constitutes his own original title, but for the purpose of repelling what he anticipates will be the defence. If, he said, the plaintiff can anticipate what the defence will be, he alleges, by means of a charge in the nature of a replication, facts which if true would show that the defence is not available against him. If he cannot, he asks the defendant what his defence is, and in what manner he means to support it. His right to ask what the defence is, admits of no doubt. He has also a right to ask in what manner the defendant means to support his defence; not, indeed, in the sense in which Sir James Wigram understands those words, namely, that the plaintiff has a right to see the documents, or to know the evidence by which the defence is to be proved, which the authorities show he is not. It is not enough, therefore, for a defendant to deny the plaintiff's title, and to assert his own; he must also show how he derives his right; must show, in short, that he has a title, which, if proved, would displace that of the plaintiff. The plaintiff having a right to a discovery of every thing which can establish or strengthen his title, or repel what he expects to be set up against it, it follows that if he alleges that a deed forming part of defendant's title, and of which without more he could not compel production, contains something which would show or support his own title, the defendant, if he does not produce the document, is bound to negative

the allegations, and that whether they relate to something to be found in the document itself, or to something to be inferred from the silence of the document. Therefore, in this case, when the plaintiff charges that in none of the charters from the crown to the corporation of London, is there any grant of the soil or bed of the river, he has clearly a right to discovery, whether it is not true that no charter contains any such grant, in order that when the matter comes to a hearing he may have an admission from the defendants themselves, that no charter contains any such grant. The other part of the interrogatory, requiring the defendants to discover and set forth under or by what charter, or letters-patent, or other grant they claim to be entitled to the freehold of the soil, looks like an investigation of the defendant's title, but it is not an investigation of the proof of that title, except as to that which constitutes the foundation of it; and that comes exactly within what Lord Redesdale says, and in which Sir James Wigram concurs, that the plaintiff is entitled to a discovery of the case upon which the defendant relies. Lord Redesdale goes further, adding, "and how he means to support it." If by these words it is intended to say that the plaintiff in the present case might ask to see the charters, and then to investigate the evidence on which the defendants rely, that would clearly be going beyond what the rule of the court would permit, and Lord Redesdale would have expressed himself too largely; but taking the words in a restricted sense, they simply enable the plaintiff to ask under what title the defendants claim the property which the plaintiff asserts to be still vested in the crown. His lordship, therefore, although he admitted that the latter part of the interrogatory was apparently open to some doubt, held, that the plaintiff was clearly entitled to an answer to the whole of the interrogatory embraced in the first exception. The remaining exceptions were allowed, upon the ground that they fell within the same principle as that already observed upon with reference to the first.

In a later part of his Treatise, Lord Redesdale expressly says, "In general, where the title of the defendant is not in privity, but inconsistent with the title made by the plaintiff, the defendant is not bound to discover the evidence of the title under which he claims." (Mitf. Pl. 190.) It is clear, therefore, that in the passage quoted at the commencement of this article, he did not intend to assert that a plaintiff is entitled to have a discovery of the documents or other evidence, by which the defendant intends to *prove* his case. Thus interpreted, the rule *that a plaintiff is entitled to a discovery of the case on which*

the defendant relies, and of the manner in which he intends to support it, is consistent with the authorities. The defendant must show that he has a title, which, if proved, would displace that of the plaintiff.

COSTS, WHERE THE ATTORNEY-GENERAL IS A PARTY.

S. C. 2 M'N. & G. 269.

THE last preceding case decides an important question, as to the course of proceeding with regard to costs, where the Attorney-General is a party.

The saying that the Attorney-General neither pays nor receives costs had passed into an axiom, which, in the words of Lord Cottenham, "too often gave encouragement to parties to carry on an unnecessary and improper litigation." It had been acted upon by the House of Lords in *Smith v. The Earl of Stair* and others (6 Bell's App. C. 487), and by the same House in affirming the judgment of Lord Langdale, M. R., overruling the demurrer to this information, when the House, acting upon Lord Cottenham's advice, had refused costs. On the other hand, there were cases in which the House of Lords had given the Attorney-General costs, particularly in *The Skinners' Company v. The Irish Society* (12 Cl. & Fin. 425), where the Attorney-General was a defendant, but the bill having been dismissed at the Rolls with costs, the House of Lords, on appeal, affirmed the whole of that decree. The authorities were conflicting, and it was most important that the rule should be clearly understood.

The question was again raised in the case before us. In overruling the defendant's exceptions to the Master's report, Lord Langdale, M. R., had dealt with the parties as private individuals, and gave costs accordingly. On the appeal to Lord Cottenham, the defendants contended that costs ought not to have been given, relying upon the rule that the crown, when suing in respect of its private revenue, neither pays nor receives costs; and they cited, amongst other authorities, the judgment of the House of Lords on the demurrer in the present case, pronounced upon the advice of Lord Cottenham himself. The question having stood over for the court to make inquiries as to the course of proceeding, Lord Cottenham, upon a subsequent day, admitted that there was an error in the advice which he had formerly given to the House of Lords. That advice was given without time for consideration; there was no argument,

and he thought there was an error in that advice. His lordship then proceeded to deliver the judgment he had formed after consulting the best authorities. To a certain extent the rule that the Attorney-General could receive no costs was necessary, in order to protect parties opposed to him as a suitor from injustice. In a suit in which the Attorney-General, if he had been a private individual, would have been compelled to pay costs, nothing would be more unjust than that he should, under any circumstances, be entitled to receive costs. In such a case, therefore, and to such an extent, the court adopted the rule. This, however, was not a case of that description, and did not fall within the rule so adopted. The party in possession of a judgment was never made to pay costs. Having got the judgment, he was entitled to defend it; and although the court upon rehearing, or upon hearing exceptions to the Master's report, which was the same thing, might be of opinion that the judgment was not right, and therefore alter it, the party who merely supported what a court of competent jurisdiction had already determined, was never made to pay costs in that contest. Here the Attorney-General was in possession of the Master's report. The defendants complained of that report. The Master of the Rolls was of opinion that there was no ground for that complaint, and gave the costs of upholding the judgment. The Attorney-General could not have been made to pay costs, and therefore his position as to costs was no grievance to the defendant upon appeal. The appeal was therefore dismissed generally, including the question of costs.

The practical conclusion from this judgment will be best expressed in the words with which Lord Cottenham concluded :—
“ I have consulted with the best authorities upon the subject, and we are all of opinion that it would be well to consider, not as a rule without exception (because it is always matter of discussion to a certain extent), but as a general rule, that the principle that the Attorney-General never receives nor pays costs, may be modified in this way, namely, that the Attorney-General never receives costs in a contest in which he could have been called upon to pay them, had he been a private individual. That would give all the protection to the suitor opposed to the Attorney-General, which is in justice due to him, and at the same time discourage what, I think, is too often the case, namely, carrying on an unnecessary litigation in consequence of the rule.”

COMMON LAW.**STATUTE OF LIMITATIONS—PART PAYMENT—PROOF OF BY
ADMISSION OF DEBTOR—9 GEO. 4, c. 14.**

Cleave v. Jones (in error), 20 Law Journ. Exch. 238.

FROM the passing of the Statute of Frauds until the 9 Geo. IV. c. 14, a debt, of what magnitude soever, might have been taken out of the operation of the Statute of Limitations, by evidence of a nature wholly insufficient to fix a defendant with it originally if above a certain sum. A mere verbal acknowledgment or promise given in evidence as having been made by the debtor, was enough to make him liable for a debt, the recovery of which was barred by the lapse of time; and thereby in those very cases in which the Statute of Limitations was most likely to be an honest defence, its beneficial effects were liable to be defeated by false swearing, of a class the most difficult to expose or punish, and the most impossible to rebut. Lord Tenterden's Act, however, rendered it necessary that the promise or acknowledgment should be in writing and signed by the debtor, and so remedied the evil; at the same time it expressly professed to leave untouched the third way of defeating the effect of the Statute of Limitations on a debt, viz. by proving a payment on account.

Now it never was doubtful on the construction of this statute, but that independent proof of a payment by the debtor on account within six years would revive a debt; but where the only evidence of the payment on account was a verbal acknowledgment of that fact by the debtor, it was held, in *Willis v. Newham* (3 You. & J. 518), that such evidence was excluded by the statute; and this decision has hitherto been followed, doubtfully, indeed, and sometimes with great reluctance. At length a prediction in Mr. Smith's *Leading Cases* (vol. i. 321 b), that its doctrine would not stand the test of a writ of error has been verified by the present case, in which a memorandum of payment of interest within six years in the debtor's handwriting (unsigned, and therefore a mere parol acknowledgment) has been held to be clearly evidence of the fact of payment. Lord Campbell, C. J., after observing that the preamble of the 9 Geo. IV. c. 14, points to the proof and effect of acknowledgments and promises, states the three methods of reviving a debt, and also the express enactment as to two of them, and the express exception of the third, and forcibly deduces from thence that "the effect and *proof* of payment on account is left exactly

as it was before the statute passed." *Willis v. Newham* seems to have been founded on the notion that the word "acknowledgment" in the statute was applicable to an acknowledgment by a debtor of a payment by himself on account, which, however, as remarked by Maule, J., would be rather in the nature of a boast than in that of an admission.

MERCANTILE LAW—BILL OF LADING—ITS EFFECT WHEN
SIGNED BY MASTER FOR GOODS NEVER SHIPPED.

Grant v. Norway, 20 Law J. C. P. 93.

A POINT of some importance with respect to the nature of a bill of lading was decided for the first time in the present case. It had been mooted, indeed, in the case of *Berkeley v. Watling* (7 Ad. & Ell. 29), but not settled, although Mr. Justice Littledale expressed an opinion in conformity with the present decision. In some respects similar in its nature to a bill of exchange, especially in its sometimes transferring to a *bonâ fide* indorsee a better right than his indorser himself had, as the law has been ever since *Lickbarrow v. Mason*, yet is a bill of lading in others very different. Both, indeed, represent property, and pass it by indorsement, but one transfers the contract itself, the other does not. A person who takes a bill of exchange *bonâ fide*, takes it with the assurance that the acceptor is bound by the sum it is expressed to be drawn for; but for the indorsee of a bill of lading, it will be necessary to ascertain that the goods in respect of which it is given are actually shipped, in order to give him a remedy against the owners of the ship.

The facts here stand thus: the master of a ship belonging to the defendants signed a bill of lading in the usual form, for goods which were to be shipped in pursuance of a charter-party between B. & Co. and the defendants, but which in fact never were shipped. B. & Co. deposited the bill of lading with the plaintiffs as security for the payment of a bill of exchange, which they thereby persuaded the plaintiffs to give cash for, and which was afterwards dishonoured; and thereupon the question arose, whether the master was the agent of the defendants, authorized to sign a bill of lading under such circumstances. It was held that, with respect to goods put on board, the master of a ship had a general authority to sign a bill of lading, conclusive upon the owners, as to the nature, quality and condition of the goods, which general authority could not be so restricted in particular instances as to affect third parties having no notice

of the restriction, in favour of whom it will be implied that he had authority to do all that is usual in the management of a ship. But "is it usual," asks Jervis, C. J., in delivering judgment, "in the management of a ship carrying goods on freight, for the master to give a bill of lading for goods not put on board? The very nature of a bill of lading shows that it ought not to be issued until goods are on board, for it begins by describing them as shipped." Thus is the question disposed of according to the general principles of the law of principal and agent. A parallel is drawn in the judgment between the case of a bill of exchange accepted or indorsed by procuration, in which case the person taking the bill has notice of a limited authority, and should see that the agent has as much as he professes to have, for the existence of such authority must be proved to enable him to recover. So, in the case of a bill of lading, general usage affects an indorsee with notice of an authority to sign, limited to goods on board; and if a more ample authority exist in a particular case, it must be shown in evidence. If the effect of this decision be to relieve shipowners from being bound by all bills of lading which their captains might fraudulently sign, on the other hand it throws much difficulty in the way of those who take bills of lading relying on the transfer of the property of the goods specified in them, and who, as they must know less of masters than the owners, who engage them, will be cautious of accepting bills of lading as valuable securities, without assurance of a special authority.

PLEADING—SET OFF—DISTRIBUTIVE REPLICATION.

Mead v. Bashford, 20 Law J. (N. S.) Exch. 190.

THE Common Law Commissioners in their Report, which has just been published, observe (p. 20), "that the excessive precision required" [to escape a special demurrer] "is scarcely practicable, except in pleadings of well-known character and daily occurrence, in which, former generations of suitors having paid costs for the settlement of the law, the pleadings have become easy and intelligible. The general plea of set-off in the actions of assumpsit and debt falls so well within this description, that one would think that in a case, which is exceedingly common, of a set-off being made up of items to which the plaintiff has various answers, he would, by this time, have been easily, and without any risk, able to avail himself in pleading of his various answers. Yet several very late cases (of which the present is one) are to be found in the Reports, in which plaintiffs, in proceeding

along this not yet sufficiently beaten path (?), have been tripped up by a special demurrer. In truth, simple as it may appear, there really is some little difficulty. In the first place it was necessary to take an accurate view of the meaning of a plea of set-off. It asserts in effect, that the plaintiff was, when the writ issued, in the defendant's debt to an amount at least equal to the balance left unanswered by the other defences (see *Tuck v. Tuck*, 5 M. & W. 109; *Spradbery v. Gillam*, 20 Law J. Exch. 237); should the defendant, therefore, prove but a shilling short of that amount, the plaintiff has a verdict upon that issue, but so much as the defendant can prove is allowed him in reduction of damages. It thus becomes important to plaintiffs not merely to answer any part of the set-off, whereby alone, indeed, they would succeed, but to negative, if they can, every part of the set-off; and if they can do so by one replication, as "*nil debet*" to the whole plea, no difficulty occurs. But if part of the set-off is barred by the Statute of Limitations, and part has been paid, or otherwise satisfied, it becomes no longer so easy. "At present," says the learned counsel for the plaintiff in this case, "it is impossible to say what the right form of replication is where there are different answers to different parts of the set-off." The plaintiff can plead but one replication; neither must it be double: the consequence is, that if he reply separately various matters to different parts of the plea, no one of his answers alone must meet the whole plea. This was the fault committed in the present replication, which was—to so much of the plea as related to one parcel of the demand, the Statute of Limitations; and to so much of the plea as related to the residue of the demand, "*nil debet*." It was, perhaps, an attempt to escape from another replication, viz., to parcel of the *plea*, the statute; to the residue, "*nil debet*," which at first seems obviously the way to reply, but which has been declared bad, because "*nil debet*," or "*nunquam indebitatus*," to the residue, being a traverse of the debt *modo et formâ*, involves a denial by the plaintiff of what was not affirmed by the defendant, that the *residue* equalled (or exceeded) the plaintiff's demand. According to this case, and *Fairthorne v. Donald* (13 M. & W. 424), the proper replication would have been that part of the set-off was barred by the statute, and that the plaintiff was not indebted to the defendant in any sum which, *with the part so barred*, equalled the amount of his demand. Altogether, it is impossible not to feel that there is much subtlety—more, perhaps, than justice requires—in all this. Tricky pleas are pleaded on purpose to demur, as in *Nutt v. Rust* (19 Law J., Exch. 54). In the present case, too, the court was not unanimous. Alderson, B., in delivering judgment,

observed, "This case was argued a very long while ago. It has been delayed in consequence of a difference of opinion among the judges, which has not altogether been removed, even at the present moment." It was argued on May 27, 1850, and judgment was given 26th February, 1851. Surely a system in which a short plea, of daily occurrence, cannot be dealt with without so much doubt and delay, is not about to be modified too soon. Plaintiff had leave to amend on usual terms.

LAW OF EVIDENCE—INCOMPETENCY—MONOMANIA.

Regina v. Hill, 15 Jurist, 470; 2 Denison's C. C. 254.

AN incompetent witness is defined, by Mr. Best, in his excellent *Manual of the Law of Evidence*, p. 148, to be one whose testimony the judge is bound, as matter of law, to reject. Of those whom the jealousy of the common law discarded as such, there were, not many years ago, numerous and comprehensive classes; of late, however, a more enlightened policy has begun to prevail; objections of several kinds to the reception of evidence have been removed by various statutes, and, perhaps, the chief remaining disqualification is about to be removed, to some extent at least, if not entirely. In the present case, a class of witnesses was, for the first time, judicially decided to be competent, which the progress of medical science has succeeded in distinguishing from similar classes which were and remain clearly incompetent. As the office of a witness is solely to relate facts, he must be clearly unfit if he cannot both observe, retain and communicate in some way or other. Thus we find it laid down in text books that idiots, persons of non-sane memory, and those who are deaf, dumb and blind are incompetent; and the same is said of lunatics, except in their lucid intervals. But insanity is now found to be sometimes partial, not only in time, by intermitting, but also in extent, as touching only one or more matters. Men are to be found constantly mad and irrational on one or two points, yet constantly lucid and sensible on all others. These are all, in some sense of the word, lunatics (although some only there are whose delusion is of a nature to render restraint advisable); and as they do not generally enjoy intervals of total lucidity, i. e. on all points, they would fall within the class of incompetent persons above mentioned, but never within the exception to it. The distinction, however, between monomania, or partial lunacy, and total, though intermitting insanity, is now recognized by the Court of Criminal Appeal. The prisoner was

convicted of the manslaughter of a lunatic under his charge; and the question reserved was, whether the evidence of one, Donelly, also a lunatic, ought to have been admitted. Donelly was proved to have a delusion about numerous concomitant spirits, but to be always perfectly rational on all subjects disconnected with his delusion. His knowledge of the nature and obligation of an oath was sufficient. Lord Campbell, C. J., in delivering the judgment of the court, said—"I am glad that this case has been reserved; it is one of great importance, and ought to be solemnly decided." And adopting a dictum of Parke, B.—"Supposing a man called as a witness has a delusion, it is for the judge to examine him as to the nature of an oath and his sense of religion, and then to say whether he is competent as a witness; and then the judge, having determined as to the admissibility of his testimony, it is for the jury to decide what credit is to be given to his evidence. . . . He may be cross-examined as to the state of his mind; and witnesses may be called to prove *that his mind is so diseased that no reliance can be placed upon his statements*; but in the absence of evidence to discredit his testimony, it would be competent for the jury to hear what he said and to act upon it." It would almost seem, from the tone of these observations, that lunacy generally will, like other grounds of exclusion, go rather against the credibility than the competency of a witness who is not obviously and entirely insane; and that judges will leave the degree of insanity and its connection with the subject of the testimony entirely to the appreciation of the jury.

COUNTY COURTS — CONCURRENT JURISDICTION OF SUPERIOR COURTS—COSTS UNDER 13 & 14 VICT. C. 61, s. 13, DISCRETIONARY.

Jones v. Harrison, 20 Law J. Exch. 166; S. C. 15 Jur. 337; Latham v. Spedding, 15 Jur. 576.

ALTHOUGH, strictly speaking, the superior courts still have a concurrent jurisdiction in every case, yet the term is specially applied to those cases only in which a plaintiff suing in one of them may recover his costs, and in this sense alone must it in general be taken. Previous to the Extension Act, plaintiffs in a superior court always got their costs, unless the defendant entered a suggestion, and by it showed that the case was none of those in which concurrent or exclusive jurisdiction was retained by the superior courts; and by this means the end was attained, but not unfrequently at such expense, to say nothing

of the risk of failure (for to frame a suggestion accurately was a matter of much nicety), as to make the permission to enter a suggestion, in many cases, no great boon to a defendant. By the 11th and 13th sections of the Extension Act this evil is remedied, for plaintiffs are never to have costs if they recover less than 20*l.*, or in cases of tort 5*l.*, until, upon their showing that the superior court had exclusive, or at least concurrent jurisdiction, a judge at chambers or the full court make an order to that effect. But the difference is not limited to shifting the burden and making the plaintiff establish his right to costs, instead of obliging the defendant to negative it; it extends further, for the plaintiff may now lose his costs, if the court or judge do not think fit to grant a rule or make an order, in cases in which formerly no sufficient suggestion to deprive him of them could have been entered. Such, at least, is the interpretation put upon the 13 & 14 Vict. c. 61, s. 13, by the present case, which arose on the following facts:—the defendant, living more than twenty miles from the plaintiff, paid 12*l.* 7*s.*, after being served with a writ for 12*l.* 13*s.*, and subsequently paid 6*s.* into court, which the plaintiff accepted and procured an order from a judge at chambers enabling him to get his costs taxed by the Master. The Court of Exchequer made a rule to rescind the order absolute, the judge (Martin, B.) who had made it fully concurring, as he had only made the order in deference to the course which Mr. J. Williams had adopted in a similar case. It was powerfully urged in argument, that as “*may*” could not be taken to give a discretion to the judge in those cases in the 13th section, in which the jurisdiction of the superior courts was exclusive, the same word could not cease to be imperative when applied to the other cases mentioned in that section. The court, however, held that the natural meaning of “*may*” was permissive, and was not to be construed “*shall*,” except when regarding a public duty. Martin, B., expressly states his opinion to be, that “*may*” is permissive as to every branch of sect. 13. It is not quite clear from the report whether Pollock, C. B., concurs in this view or no; but the point is of no practical importance, as no judge would exercise his discretion by refusing costs in a case of exclusive jurisdiction. The second case is a practical illustration of the beneficial working of the substituted system. The plaintiff got 40*s.* damages in trespass for a wrongful distress; one of the pleas was “*not possessed*.” Now, in a very recent case, *Timothy v. Farmer* (7 C. B. 814), it was held, that no suggestion could be entered under similar circumstances, on the ground that title was in question (which it was not really in either case). But there, observes Lord Campbell, C. J., the

initiative lay on the defendant, who was, he suggests, concluded, by his having pleaded "not possessed," from asserting that title did not come in question. But now the onus is on the plaintiff, and we think it clear that he is bound to show that he could not sue in the County Court, by establishing the fact that the title did really *bonâ fide* come in issue, not merely that the defendant had so pleaded that it possibly might have come in issue. Accordingly, an order made by Patteson, J., on the supposition that title was put in question, and that if so, he had no discretion, was discharged.

Here we may also notice *Parker v. Great Western Railway Company* (20 Law J., Exch. 112), in which a very strong opinion was expressed by the Court of Exchequer that the right of appeal given by the 13 & 14 Vict. c. 61, did not affect the right to remove by certiorari a plaint from the decision of which an appeal might be had; and also the case of *In re Brookman v. Wenham* (20 Law J. Q. B. 278), in which a rule *nisi* had been obtained for an attachment against the judge of a County Court for not returning a certiorari for removing a plaint which had been brought to recover 36*l.* 16*s.* upon a bill, when Erle, J., sitting in the Bail Court, although he discharged the rule upon another point, held that the writ of certiorari was valid, inasmuch as the Extension Act must be construed to leave the power of issuing a certiorari as it stood under the 9 & 10 Vict. c. 95, which provides for it in some cases.

LANDLORD AND TENANT—DISTRESS—NOTICE.

Wakeman v. Lindsay, 19 Law J., Q. B. 166; *Kerby v. Harding*, 20 Law J. Exch. 163.

A DISTRESS for rent in arrear is perhaps the most valuable, and certainly the most familiar instance in which a man may lawfully obtain redress by his own act. More than common interest, therefore, attaches to any decision upon the forms which attend or the restrictions which limit its use. The remedy was, however, but a cumbrous one, until the power of selling the distress was given by statute. This was given by the 2 Will. & M. s. 2, c. 5, which at the same time imposes certain obligations, one of which is, in substance, that effectual notice of the distress should be given to the tenant. This notice should be in writing, and usually, in practice, consists of two parts; the first informing the tenant wherefore and by whom the distress is levied upon such of his goods and chattels as are therein stated to be mentioned in the other part, which is in the

form of an inventory or catalogue. As, at common law no such notice was necessary; the landlord had only to take the goods upon the premises for which the rent was due, to impound them and convey them to some public or private pound, and if the latter, to give notice of its locality; so the tenant could, by seeing what was taken to the pound, know easily to what the distress extended. This information he now gets from the inventory part of the notice, and these two cases turned upon what was sufficiently explicit as such. In the earlier case the inventory, after specifying various articles, concluded, "and any other goods and effects that may be found in and about the said premises, to pay the said rent and expenses of this distress." Everything on the premises was intended to be taken, and was actually taken; and the court, not without some reluctance, held the form sufficient, as it would just bear that interpretation. In the latter case the inventory, after likewise specifying divers chattels, ended thus,—"and all other goods, chattels and effects that may be found in and about the said premises, *that may be required in order to satisfy the above rent*, together with the expenses." The court thought these terms too vague, and that they did not point out any *certain* goods, chattels or effects, other than those specified, and accordingly, except as to those, they held the subsequent sale to have been illegal for want of the requisite notice. Had the conclusion ended with the word "premises," and had everything been taken, it would have been otherwise, on the authority of the previous case. The principle to be deduced from these two cases is, that the person distrained upon has a right to know exactly which of his chattels are taken and which are not. It is not, indeed, requisite that this should be attained by his being furnished with a strictly accurate catalogue of all that are seized, but he must have information sufficiently certain to enable him to gather clearly, as to any one chattel in particular, whether it is meant to be included in the distress or not. This he may do if he is informed that "all on the premises," or "all in the parlour," or "all in one corner of the room," are taken, as certainly, though not as easily, as if each were specified; but he has no means of knowing to which "so many as may be required," or "all that may be wanted," to pay the rent and expenses, may or may not apply. He can neither know which he may still lawfully dispose of, nor judge whether the distress be excessive, or not.

LANDLORD AND TENANT—DISTRESS—FIXTURES.

Hellawell v. Eastwood, 20 Law Jour. Exch. 154.

ANOTHER important point in the law of distresses was decided in this case. It was whether cotton-spinning machines, which were fixed by means of screws, some into the floor and some into lead which had been poured in a melted state into holes in the stone, for the purpose of receiving the screws, were by law distrainable for the rent of the mill in which they were affixed. As the case was not touched by any of the statutes affecting distresses, it was decided entirely upon the liability of a thing to be distrained, as it stood at the common law. The counsel for the plaintiffs quoted Amos and Ferrard on Fixtures, where it is laid down, "that things adhering to the freehold cannot be taken under a distress . . . And this rule holds not merely in respect of such things as become by annexation parcel of the inheritance, and are not afterwards severable, but it applies to fixtures of whatever nature or construction, and whether put up for trade or for any other purpose" (2nd ed, p. 314), and they argued that the machines, being fixed with screws, were clearly fixtures. On the other side it was argued, that chattels so fixed to the land as to be easily removable, without injury to the land or to themselves, were distrainable. As far as regarded the exemption from distress, on the ground of injury to the machines, from the taking to pieces, which would have been necessary had they been carried to a pound, as by the common law they ought, that ground was held not to apply to them more than to any other chattel which could not be removed entire, as they were not of a *perishable* nature, and the only injury to their owner was the trouble of carrying them back from the pound and refitting them, and that the law cast upon him. But with regard to their being fixtures, more consideration was necessary. It is undisputed law, that whatever is fixed to the freehold, *and becomes part of it*, cannot be distrained. Independently of the detriment to the thing itself, it has become "part of the thing demised, and the nature of distress is not to remove part of the thing itself for the rent, but only the *inducta et illata* upon the soil or house (Gilbert on Distresses, pp. 34, 48). Now the question whether the machines were parcel of the freehold, was held to depend upon two considerations; 1st. The mode of annexation, as affecting the safety and facility of their removal, without injury to the freehold or themselves. 2nd. *On the object and purpose of the annexation*, whether it was for the permanent and substantial improvement

of the dwelling, or for the more complete use and enjoyment of the chattel. And with regard to this last point, which indeed almost wholly governs the decision, Parke, B., in delivering the judgment of the court, expressed his opinion as follows:—
 “The object and purpose of the annexation was not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels. They never were part of the freehold any more than a carpet would be which is attached to the floor by nails, for the purpose of keeping it stretched out, or curtains, looking-glasses, pictures, and other matters of an ornamental nature, which have been slightly attached to the walls of the dwelling as furniture, *and which is probably the reason why they and similar articles have been held in different cases to be removable.*”

Had this principle been more generally recognized, and the mere mode of annexation not so exclusively considered, it is probable that much of the difficulty, and no little of the confusion, that now attends the law of fixtures, might have been avoided. One of the sources of difficulty is in the ambiguous use of the word fixtures; it has been applied too generally to whatever is in any way affixed to the freehold, whether it become parcel of it thereby or not. The holding a fixture to be removable between landlord and tenant, and not between heir and executor, seems strange, if the mode of annexation be the same, and that alone be considered as the basis of the decision. But if the presumed intention of the person annexing a chattel to the freehold be also looked to, the inconsistency will disappear, and many apparently conflicting decisions will be reconciled. In Amos and Ferrard on Fixtures (p. 318, 2nd edit.), observations are made upon the contradiction between the point decided here, and which was contended for in *Duck v. Braddyl* (1 M'Clel. 217), with the case of the mill-stone. Now, it would doubtless be very difficult to distinguish between the two, if the mode of annexation only be looked at. But it is probable that the mill-stone was either demised with the mill, or put up together with it by the tenant, and constructively as much a parcel of the freehold as is the key of a door, although not actually affixed. If it were worn out, or discarded for a better, then either mill-stone or key would, it is submitted, revert to the state of a mere chattel. The first ground assigned for the privilege of the stocking frame, in *Simpson v. Hartopp* (1 Smith's L. C. 190*), viz. *the injury to the stocking then weaving*, could not be now relied on.

RAILWAY—DEBT FOR CALLS—CALLS PAYABLE BY INSTALMENTS.

Ambergate Railway Company v. Norcliffe (in error), 20 Law Journ. Exch. 234.

THE question, whether directors of a company, in making calls payable by instalments, legally exercise their statutory powers, has received the decision of the Court of Exchequer Chamber, and the validity of such calls may be taken to be clearly established. Against their validity was the decision of the court below in the present case, which was followed by the same court in the case of *Ambergate, &c. Railway Company v. Coulthard* (19 Law Journ. Exch. 311). In favour of their validity, a decision of the Court of Queen's Bench in *The Architects' Insurance Company v. Wilson* (16 Law Times, 124), which the Court of Exchequer, in two recent cases in which they gave judgment simultaneously, followed in preference to its former decisions, distinguishing, however, the case of *Ambergate, &c. Railway Company v. Coulthard*, as supportable (although not decided on that ground), inasmuch as in it the action was brought before the second instalment was due. It would seem, therefore, that although a call made by instalments be good, yet, except in its bearing upon the question of interest, little is gained by making the first instalment payable on an earlier day than the second; for if the shareholders are not willing to pay, no proceedings can be taken to compel them to pay before the day for the payment of the last instalment arrives.

Of other special defences to the statutory action for calls we may notice bankruptcy, which, in the case of the *South Staffordshire Railway Company v. Burnside* (20 Law Journ. Exch. 120), was held to be no defence. This decision, however, went only upon the construction of the 6 Geo. IV. c. 16, ss. 51, 56, and a new description of contingent claim is made provable for by the 178th section of the Consolidation Act.

As to another defence, that of infancy, there have been several decisions, (the latest being the *London and North Western Railway Company v. M'Michael* (20 Law Journ. Exch. 97)), the result of which would seem to be, that unless a defendant be still under age, or have *by some positive step* repudiated the ownership of his shares, he cannot escape being liable for calls made in respect of them.

Short Notes of New Books.

Foss's Lives of the Judges. Vols. III. and IV. London: Longman & Co. 1851.

TWO more volumes which now commence to give a little more readable material. We hope ere long to pick a sufficiency of *morceaux* to fill an article. The book improves, and the research of the author is marvellous.

Baker's Practical Compendium of the Statutes, Cases, &c. affecting the Office of Coroner. London: Butterworths. 1851.

THIS is really a very strange production for a law book, but notwithstanding an amusing one. The practitioner who opens it with a view of learning the law on any given point within the scope of a Coroner's duties will perchance light on a penny-a-line newspaper paragraph headed "HORRIBLE DISCLOSURE," or a Chapter on "Homœopathy," or a List of Wrecks, &c. &c. The Appendix begins soon after the middle of the book, and contains heaps of Statutes (entire), Poor Law Orders, Board of Health Orders, &c. &c. Anything much less like a Compendium we have seldom seen. But it contains much useful matter nevertheless.

Fonblanque's Bankruptcy Reports. London: Butterworths.

VERY carefully and skilfully done. They will be a much more useful series than most of those we have had from the prolific reporting corps.

Macrae's Practice of Insolvency. London: Crockford, Essex Street.

THIS book is fairly executed, and methodically arranged in the order in which the proceedings occur. We believe it will prove useful in practice, and that it will supply some very manifest deficiencies in other works.

Events of the Quarter.

THE Earl of Cottenham's lamented decease has taken place. His life will form the subject of an early Memoir.

NEW QUEEN'S COUNSEL.—The following gentlemen have been appointed as Queen's Counsel:—Messrs. Ingham, Warren, Pashley, Atherton, and Hugh Hill, of the Northern Circuit; Messrs. Willmore and Mellor, of the Midland Circuit; Mr. Bramwell, of the Home Circuit; Mr. Slade, of the Western Circuit; Mr. Phillimore, of the Oxford Circuit; and Messrs. Willcox, Headlam, Follett, W. T. S. Daniel, Glasse, Campbell, Craig, Chandless, and Bailly, of the Chancery Bar.

CALLS TO THE BAR.—INNER TEMPLE.—The following members of this society have been called to the bar:—*May 2.* Roger Fenton, of University College, London, B.A.; John Harrison Miller, of Wadham College, Oxford, M.A.; Mr. William Stuart, Mr. James Pearse Peachey; James Pearse, of St. John's College, Cambridge, B.A.; Thomas Hugh Markham, of Brasenose College, Oxford, B.A.; Mr. John Francis Campbell; and Arthur Codd, of Trinity College, Dublin, B.A.

June 17th.—Edward Pakenham Alderson, of Balliol College, Oxford, B.A.; George Slater, of Balliol College, Oxford, B.A.; Robert John Sandiford Farrar, Esq.; and William Gill, Esq.

MIDDLE TEMPLE, *May 10th.*—John Raymond, Esq., Thomas Geary, Esq., Joseph Shipton, Esq., and Joseph Kerr, Esq.

June 14th.—Louis Antoine Alfred Koenig, Esq., and William Hemings, Esq.

LINCOLN'S INN, *May 8th.*—Henry R. Farrer, M.A.; John G. Mayo, Esq.; Thomas P. Beckworth, B.A.; Townley Filgate, M.A.; Frank W. Bush, M.A.; Francis S. Reilly, M.A.; Francis H. Appach, M.A.; Henry Wilbraham, M.A.; Joseph N. Higgins, B.A.; Thomas W. Wigglesworth, M.A.; and James W. Langworthy, Esq.

GRAY'S INN, *May 7th.*—William Furner, Esq.

May 28th.—Edward Paul Page, Esq.

June 16th.—Jackson Gillbanks, Esq., LL.B. and B.A.

ATTORNEYS' CERTIFICATES.—The bill brought into the House of Commons by Lord Robert Grosvenor and Sir F. Thesiger, to repeal the annual certificate duty payable by attorneys, solicitors, proctors, writers to the signet, and notaries, has been printed. A certificate will be given under this act which will be, in all respects, equivalent to the present stamped certificate.

The annual examination in law instituted by the society of Gray's Inn, took place in the Hall on Thursday and Friday, the 5th

and 6th June, and the following is the class list of the successful candidates for honours on that occasion.

1. Mr. William Fowler, of the Inner Temple.
2. Mr. Oliver Claude Pell, of Lincoln's Inn.
3. Mr. Edward Samuel Dale, of Lincoln's Inn.
4. *Æquales* { Mr. Richard William Fisher, of Lincoln's Inn.
Mr. Horace Townsend, of Lincoln's Inn.
5. *Æquales* { Mr. Leonard Field, of the Inner Temple.
Mr. Joseph Napier Higgins, of Lincoln's Inn.
6. Mr. John Lindsey Reed, of the Inner Temple.
7. *Æquales* { Mr. David Kitcat, of the Inner Temple.
Mr. George Tayler, of the Inner Temple.

Mr. Fowler received from the lecturer, Mr. W. D. Lewis, his prize, consisting of a complete set of the Reports of Vesey, junior (20 vols.)

LONDON AND DURHAM UNIVERSITIES.—The Masters of the Bench of Gray's Inn have recently passed an order that members of the London and Durham Universities shall have the same privileges with respect to calls to the bar at Gray's-Inn as are enjoyed by members of the Universities of Oxford, Cambridge and Dublin.

The Students of the Inner Temple Society have presented Mr. Hurlstone with a handsome silver tea service, as a token of respect for his long and efficient duties in the society. It bore the arms of the society, and had the following inscription:—"Presented by the students of the Inner Temple to Mr. William Hurlstone, on his completion of the 37th year of his connection with the society.—Trinity Term, 1851."

Mr. Henry Sedgwick Wylde, barrister-at-law, has been appointed one of the Registrars of the Court of Bankruptcy, in the room of Mr. Charles Waterfield, resigned.

J. S. Mansfield, Esq., is appointed Stipendiary Magistrate of Liverpool.

In Scotland Mr. Rutherford has succeeded Lord Moncrieff, deceased, as a Judge of the Court of Session; Mr. Moncrieff as Lord Advocate, and Mr. Cowan as one of the Lords Justiciary, and Mr. Deas as Solicitor-General.

M. Duncan Mac Neill has also been appointed one of the Lords Justiciary.

A deputation from Jersey—Mr. Edward Nicolle Law and Mr. W. Grant Dumaresq—had an interview with Sir George Grey at the Home Office, to present a petition from the inhabitants of Jersey, praying for the establishment of a paid police, a sitting magistrate, and a Court of Requests for the recovery of small debts. It will be very wrong in the government to refuse some such measure of common justice to Jersey. We believe the abuses of the present system are infamous.

List of New Publications.

Archbold—The Law relative to Pauper Lunatics, with Forms in all cases required in Practice; also the Law and Practice in Appeals against Lunatic Orders. By J. F. Archbold, Esq., Barrister. 12mo. 7s. 6d. boards.

Archer—An Index to the unrepealed Statutes connected with the Administration of the Law in England and Wales, commencing with the Reign of William IVth, and continued to the close of the Session 1850. By T. G. Archer, Solicitor. 8vo. 5s. boards.

Arnold—A Treatise on the Law relating to Municipal Corporations. By T. J. Arnold, Esq., Barrister. 12mo. 12s. boards.

Cockburn—A Letter to Sir A. Cockburn, M.P., Attorney-General, on Advocacy in the County Courts, by a Barrister. 8vo. 1s. sewed.

Colquhoun—A Summary of Roman Civil Law, illustrated by Commentaries on, and Parallels from, the Mosaic, Canon, Mahommedan, English and Foreign Law. Royal 8vo. part 3, 12s. 6d.

Conveyancing—The Hand Book of Precedents in Conveyancing, with Practical Notes prepared by Counsel. 12mo. 10s. 6d. cloth.

County Courts—New Rules of Practice to be observed in the County Courts, together with a Scale of Allowance to Witnesses, and of Fees payable on Proceedings therein, with Notes and a copious Index. By a Barrister. 12mo. 3s. sewed.

Darling—Can a Clergyman create an Equitable Charge on his Living, under the Statute 1 & 2 Vict. cap. 110? By J. Darling, Esq., M.A., Barrister. 8vo. 1s. sewed.

Godson—A Supplement to Godson's Practical Treatise on the Law of Patents for Inventions, and of Copyright in Literature, the Drama, Music, Engraving, and Sculpture, and also in Designs for the purposes of Sale and Exhibition. By P. Burke, Esq., Barrister. 8vo. 8s. boards.

Hare—Supplement to a Short Proposal for Diminishing the Costs and accelerating the Determination of Suits in Equity. By T. Hare, Esq., Barrister. 8vo. 1s.

Lawes—The Act for promoting the Public Health, with Notes, and Appendix containing the Supplemental Acts of 1849 and 1850. By E. Lawes, Esq., Barrister. 12mo. Third Edition. 8s. boards.

Lund—A Treatise on the Substantive Law relating to Letters-Patent for Inventions. By H. Lund, Esq., Barrister. 12mo. 6s. cloth.

Oliphant—The Law of Church Ornaments and Utensils; including Communion Tables, Vestures, Organs, Candles and Crosses. By G. H. H. Oliphant, Esq., Barrister. 12mo. 5s. boards.

Prideaux—The Act to amend the Law for the Registration of Voters, with an Analytical Introduction, a Reference to Cases, and other matters of Election Law. By C. G. Prideaux, Esq., Barrister. 12mo. Second Edition. 5s. boards.

Roscoe—A Digest of the Law of Evidence on the Trial of Actions at Nisi Prius. By H. Roscoe, Esq., Barrister. Eighth Edition, by E. Smirke, Esq., Barrister. Royal 12mo. 25s. boards.

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THE
LAW MAGAZINE;
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QUARTERLY REVIEW
OF
Jurisprudence.

ART. I.—PUBLIC TRUSTEESHIPS.

CHANCERY Reform is the popular cry of the day; it has already worked some valuable amendments in the jurisdiction of equity, and promises wholesome alterations for the future. The abuses complained of are confessedly numerous and flagrant, but it is not wonderful, when litigation is instigated by some of the worst passions of the human heart, that its instruments, Law and Lawyers, should themselves be occasionally defiled by the contact. Where the source is so impure and the stream so polluted, some allowance must be made for the state of the channel through which it flows. Reformers have hitherto rather followed the rivulets than sought the fountain-head of abuses; consequently theirs has been a labour of cure rather than of prevention. Instead of directing their efforts to the diminution of the subject matter of equitable interference, they have laboured in the improvement of its administrative system. The object of the following proposal, on the contrary, is to ameliorate the Court of Chancery by removing from it altogether a vast amount of its most vexatious and merely formal business, instead of solely providing for its negotiation when there. The measure proposed not being retrospective or imperative, but only prospective and optional in its operation, propitiates in limine those "vested interests" generally so inimical to any innovation. It also possesses, as will be seen, the no mean recommendation of being *self-supporting*.

It is well known, that by far the greater portion of the jurisdiction of the Court of Chancery is based on the system of trusts: and that the definition and enforcement of the reciprocal rights and duties of trustees and cestuis que trusts form the most important item of its functions. The one branch alone of trusts by express declaration, without reference to the various ramifications of trusts by operation of law, is quite sufficient to justify this allegation. It is also equally notorious that the fiduciary relation of trustee or cestui que trust becomes applicable to almost every possessor of property at some period or other of

his life. It is a universal social compact, regulating our dearest interests, which all good citizens are obliged to enter into, and on the due performance of which depends the happiness of the whole community. The unthankfulness and danger of the office of trustee is proverbial, and it can scarcely be otherwise, when nothing less than the exact performance of the trust is expected, and no expectation can be more Utopian. This may easily be conceived, when it is understood, to adopt the language of Lord Bacon, that for the private conscience of the trustee the general conscience of the realm, which is Chancery, is required to be substituted, and when also the extent and profundity of the science of equitable jurisprudence, which constitutes that *recorded* conscience, is duly taken into account. Under the present method conventional requirement imposes an unsatisfactory obligation on all parties concerned. The testator or settlor is aware that he subjects his friend to an unremunerative and perilous burden, and that the representative of that friend in whom the trust may finally vest may be as unprincipled as the friend himself is honourable. Again, the friend, although perfectly satisfied of the good faith of his present cestuis que trusts, cannot ensure that of the next generation. And if mutual amity be not preserved, where is the administration of a trust in which some flaw may not be found? In a multitude of cases the trustee or executor has alone the invidious choice of throwing the estate into chancery, or fettering himself and family with liabilities. He is offered the melancholy alternative of ruining his own or his testator's family. Some idea may be formed of the effect of the paternal care of the court on a small property by the fact, that an estate now in chancery, worth 8000*l.* per annum, costs yearly about 2000*l.* for management. Altogether the subsisting system results in this, that a man whose days have been rendered weary and nights sleepless to obtain a provision for a helpless family, on his death-bed finds the enjoyment of his hard earnings secured to them on no greater certainty than the infallibility of friends, or the costly integrity of the Court of Chancery. Truly a happy reflection to smooth the pillow of one who would be at peace with himself and the world! The foregoing is merely a very cursory allusion to a few of the inconveniences which accompany that personal confidence termed a trust, as more especially annexed to the person and acts of the trustee himself. A ponderous volume might be written on the difficulties attending the very nature of trust property itself, as in its vesting and transition, difficulties which in a number of instances can only be remedied by the court. In evidence of this, we need only mention the Trustee Act of 1850 and its precursors, commonly known as Sir E. Sugden's Acts.

The proposition hereby offered as a reparation of the majority of these evils is simply as follows. Let district public trustees and executors be named throughout the country. The commissioners of bankruptcy or county court judges afford exponents convenient of adaptation for the purposes of the experiment. Let every cautious man making a will or settlement have the option of appointing the district officer trustee and executor, or trustee thereof. By virtue of this appointment, the property might then either vest absolutely in the appointee as effectually as a bankrupt's assets now vest in his official assignee, with all requisite powers of management, or be left to the ordinary alienation and limitation of the will or conveyance. It is opined, that the latter course would be most practical and least subversive of established custom. The public trustee would then be invested with certain powers and liable to certain duties, in the same manner as a common trustee. Discretions might be given and reserved to third persons, as to the wife, the protector of the settlement, just as is now done; but the public officer should not be embarrassed with a co-trustee in estate. It would be very desirable however, from abundance of caution, that some person should be appointed, whose signature with that of the public trustee should be indispensable to make a title to any species of trust property which passes by mere delivery. Thus in variations of investments such a joint receipt would be clearly a beneficial preservative from the unrestrained disposal of the public trustee. But where the trust was of realty there could be no reason for such a precaution; for to make away with a landed estate surreptitiously by a successful fraud would be next to impossible, since the hands it came from would be *primâ facie* evidence of notice against the purchaser. This protective trustee, as he might be called, would be no further concerned in the administration of the trust, than in seeing that the trust personalty was received or invested. Beyond that, he would not acquire the slightest authority or incur the least responsibility. His function would be purely ministerial and controlled by the will of the public trustee. As a matter of course there should be an adequate power limited for the change and new appointment of these protective trustees. When a public trustee died or was removed from his office, his successor should stand possessed of the trust property upon the then remaining trusts of the original instrument in as full and ample a manner as his predecessor, without the expensive formalities of a new set of conveyances. An indorsement officially stamped on the first deed or deeds, stating the new appointment, should be deemed sufficient to carry on the title. The public trustee would be an officer of the court who would be regularly accredited and empowered as

fully as a Master in Chancery. In the general administration of the trusts he would act independently; he would have liberty to examine upon oath for the acquirement of necessary information, and would in ordinary routine decide thereon, subject of course to appeal. If, indeed, any novelty should arise, any important question of construction, or of contested rights, where he had not the light of precedents to guide him, he would be bound from himself to submit it to the more competent tribunal of one of the courts of chancery. This submission for adjudication, his professional education and experience would enable him to put in the form of an exact statement or special case, precisely displaying the points in issue. This statement should be received as of equal authenticity with a master's report and disputed in like way by exceptions. In a great number of instances there would not be any contention, but the opinion of the court would be sought merely to satisfy the mind of the public trustee. For the avoidance of carelessness or inefficiency in these trustees, the Chancellor might be enabled to mulct them in exemplary costs when properly justified by condemnatory circumstances. The expenses of this state trusteeship could be met by the deduction of a small per-centage on the estates administered. Usual charges attending the performance of trusts, as for money really expended, or work and labour done, might of course be made the subject of a taxed bill.

So much for the scheme itself, in which the writer knows not whether there be any originality, though he can scarcely believe in the fortune of striking out a new path in a route where there have been so many wayfarers before him. He will now proceed with more particularity to mention some of the most potent defects of the present organization of trusts, which would be clearly remedied by the suggested change.

At the very inception of a trust the nominated trustee is involved in a snare; for, although dissentient, he may suddenly discover himself oppressed with a load he will most likely have to carry to the grave, and finally leave behind him as a legacy of annoyance and litigation to his children. Some trifling act of assistance to the bereaved family of his testator, dictated by compassion, or even an intended movement of avoidance, will be constituted by the court into an acceptance of the trust; and the poor man becomes a victim for the rest of his days to the horrors of impending equity, in comparison with which the sword of Damocles were happiness. Certainly, the form of disclaimer is now settled which will release from liability, *provided always* there have not been any ambiguous actings previously. But some persons do not consider it safe or pleasant to meddle with "the skin

of an innocent lamb" on slight provocation. The writer remembers a case in chambers in which two trustees unequivocally refused either to act or disclaim. Some family quarrel had taken place, the malcontents were Welchmen,—were farmers, and relatives of the parties interested; facts which will give some notion of the virulence and obstinacy displayed. The matter was not worth going to law about, so at last, an estate was sold at a reduced value from the consequent defect in the title, and a learned conveyancer repaired the trust breach as best he might. It will be seen from the following case, that a seeming and designed repudiation may be construed by equity into an acceptance; that acting under counsel's opinion is no extenuation, whatever the conflict of authorities; and that no astuteness short of a spirit of prophecy will suffice to preserve the unfortunate nominee to a confidence. (*Wich v. Walker*, 3 My. & Cr. 706.) Here a testator gave a legacy of 1100*l.* to two persons, upon certain trusts for the benefit of his daughter and her children; and then gave a messuage to the same persons, upon trust for his widow for her life, and, after her decease, upon trust to convey the same to his grandson on his attaining the age of 21. He appointed his widow sole executrix. When the widow died the grandson had attained his majority. The trustees *never acted in the trusts*. They were solicited by the grandson to make over the messuage to him, and being *advised by counsel*, that a conveyance might be safely executed by them without constituting an acceptance of the trusts of the will, they by a deed, reciting the will, the death of the widow, and the majority of the grandson in her lifetime, "whereby it became unnecessary for them to act in the trusts declared by the will, and in fact they *never intermeddled therein*, but inasmuch as the legal estate in the said messuage was still outstanding in them, they had consented, at the request of the grandson, to convey such estate to him,"—conveyed the devised messuage to the said grandson. A bill was filed by the parties interested in the legacy of 1100*l.*, which prayed an account against the personal representatives of the widow, and further sought to make the then surviving trustee personally liable to make good the legacy in question with interest, on the ground that he had accepted the trusts of the testator's will. It was held by the Vice-Chancellor, and affirmed on appeal by Lord Cottenham, that the execution of the deed was sufficient evidence of acceptance of the trust, and constituted the surviving trustee liable for any default by the widow executrix deceased or her representatives. This equitable iniquity was perpetrated in despite of the dicta of no less a judge than Lord Eldon, in *Nicholson v. Wordsworth*, 2 Swan.; and which probably influenced the opinion of the trust-

tee's professional adviser. Lord Eldon there said, "My opinion is, that if a person who is appointed co-trustee by any instrument, executes no other act than a conveyance to his co-trustees, when the meaning and *intent* of that conveyance is disclaimer, the distinction is not sufficiently broad for the court to act upon. I can find no case which has decided, nor can I find any reason for deciding, that where the *intent* of the release is disclaimer, the inference that the releasor has accepted the estate shall prevent the effect of it." An unlearned person would naturally imagine that a chancellor was not obliged to stand on logical or legal exactness, and that although in strictness a conveyance implied an estate to convey, yet that the *expressed intention* would have had primary weight in a court of conscience.

Suppose the pons assinorum crossed, and the trustee and executor in full undoubted possession of all the dignity of his newly assumed capacity. His first duty will be to get in as expeditiously as possible the assets of his testator; a duty sometimes modified by special directions. An omission in the due realization of the property; ignorance of what securities should be left outstanding and what called in, will be treated as crimes, and visited severely with equitable pains and penalties. Should there be a power of sale, to ensure a valid execution, its terms must be pursued with the greatest exactitude. Some powers of sale will be lost by the disclaimer or death of a co-trustee; and questions on the ability of a trustee to give good receipts for the purchase money, may be determined by the intention of the testator, presumed from minute circumstances of the state of the cestuis que trusts, or the specialty of the trust itself. The trustee will next perhaps have to grapple with the legal niceties of marshalling assets, of repetition of legacies, or of satisfaction. In the latter he will perchance learn to discriminate between a testator's regard for his child and his creditor. He will find that a trifling difference in the debt and legacy will, in favour of a creditor, rebut the presumption of satisfaction, but that the most palpable distinctions between a portion and legacy will not suffice to give the child the benefit of the testator's bounty. He will be told that the perfection of reason imputes to the parent a ridiculous act of supererogation, a double donation of the same subject, rather than admit the possibility of his wishing to be more generous to one child than to another. To quicken the trustee's inspiration in his new study, he will be also informed that the smallest mistake in the distribution of the estate will be at his own peril. Assumed that he is prudent and has engaged professional assistance at the outset. Still, solicitors are not omniscient, cases for counsel do not always contain an impartial exposition of facts, nor are counsel themselves infallible.

And eventually should all go smoothly as a marriage peal, the learned who make this sweet harmony must be well paid for their trouble.

The perplexities of immediate distribution being overcome, probably the next pressing duty will be that of investment. Losses accruing from any delay, any momentary neglect, or any mistake in the application of the funds, will fall upon the unconscionable trustee with all the fell malignity of a bill for an account. If there are renewable leaseholds, he must invest to meet the fines for renewal, and adjust the almost inappreciable proportions of cost between tenant for life and remainder-man. Then again no matter how available a security offers, the three per cent. consols alone will hold him harmless. Should he be weak enough to confide in his knowledge of plain English, he will possibly have to pay dearly for his vain self-reliance. For example, it is decided, that an authority to lend on such personal security as trustees shall think sufficient, will not justify a loan to the husband of a cestui que trust who is in trade, or indeed to any trading concern. No allowance is made for human sympathies. Lord Langdale, in *Fyler v. Fyler* (3 Beav.) remarked, "Cases which are very painful are not unfrequent in this court; we find a married woman throwing herself at the trustee, begging and entreating him to advance a sum of money out of the trust fund to save her husband and her family from utter ruin, and making out a most plausible case for that purpose. His compassionate feelings are worked upon, he raises and advances the money; the object for which it was given entirely fails, the husband becomes a bankrupt, and in a few months afterwards the very same woman, who induced the trustee to do this, files a bill in a court of equity to compel him to make good that loss to the trust. These are cases which happen. They shock every one's feelings at the time; but it is necessary that relief should be given in such cases, for if relief were not given, and if such rights were not distinctly maintained, no such thing as a trust would ever be preserved." The conclusion is most true, but it affords no reason why there should be an imposition on society which incurs so severe a contest between duty and benevolence.

The maintenance, education, and advancement of infants affords constant work for Chancery. In minor cases the court grants such assistance upon petition; but should the magnitude of the income warrant the expense, a bill is filed, succeeded by its beautiful continuity of process. An express power of maintenance at the discretion of trustees will not authorize them to advance for that purpose in the lifetime of the parents without

the sanction of the court. Chancery will have a bite at the oyster. Even where the parent has been proved too poor to support the infant and maintenance accordingly allowed, the repayment of former outlays on that account was not suffered. (Ex parte Bond, 2 My. & K.)

Keeping up a trusteeship by the appointment of new trustees in the place of those deceased or desirous of retiring, and by vesting the property effectually in the continuing and new trustees as joint tenants, is one of the most technical and expensive operations of conveyancing. The smallest oversight leads sometimes to incalculable and fatal confusion. A word out of its place in the power of appointment, a slight slip of the ingrosser's pen, or the attorney's eye, may nullify every attempt at rectification. The least variation from the usual form necessitates the conveyancer's most anxious attention. Say, that a power of new appointment is limited to a "surviving or continuing trustee." It is thought by the erudite superstitious, that a surviving trustee should not appoint two trustees in the place of himself and the deceased trustee, but first appoint a person in the room of the deceased trustee, and then the person so substituted may, as continuing trustee, appoint a new trustee in the place of the one desirous of retiring. When there are many different kinds of trust property the ingenuity of the draftsman is taxed to the utmost. Where the property is realty, settled to uses, there must be a revocation, a conveyance to a provisional trustee, and a re-conveyance by such provisional trustee to the remaining and newly appointed trustees upon the old uses. Personalty always demands an assignment and re-assignment to obtain a joint-tenancy in the continuing and new trustees. Besides all this double toil and trouble, the retiring trustees will probably want voluminous releases. It may be that the trust has not the felicity of a power to change and renew trustees, or that it is destroyed by some inadvertency, when recourse to Chancery is inevitable. It also frequently happens that a trustee is lunatic, is an infant, or is contumacious, that he is out of the jurisdiction, that it is unknown whether he be living or dead, or which is the surviving trustee, or whether the surviving trustee left a heir or devisee, in all which events a Chancery process must ensue.

Now on the hypothesis that a trustee has scrupulously fulfilled his trust, and retires with a due release, and with the united thanks of his cestuis que trusts,— is he to be considered free from future danger? The well known case of *Knatchbull v. Fearnhead* (3 My. & Cr.) directly manifests the contrary. There a breach of trust took place in the years 1801 and 1804 re-

spectively. The two trustees implicated therein died, one in 1814 and the other in 1824. The suit was instituted in 1833 to charge the personal representatives of the trustees deceased with the loss consequent on the alleged breach of trust. The executors of one trustee admitted in their answer the receipt of sufficient assets, and stated that they were wholly ignorant of the existence of any such trust as in the bill alleged until 1830, and that they had accordingly administered the estate of their testator, and finally divided the residue among the residuary legatees. Notwithstanding their total want of knowledge, not only of the breach but of the very trust itself, they were held liable to make good the loss, occasioned by the misfeazance of their testator, out of their own proper monies, and the Chancellor laid it down, that a trustee and executor, who pays away residue without passing his accounts in the court, does so at his own risk.

In all that has been before adduced we have given the trustee credit for good faith and right intentions. If he be dishonest and of evil intent his powers of malversation are unlimited. He may spoliato to any extent by wilful default or fraudulent alienation. He may freely appropriate the trust personalty to his own use, and convert the realty to personalty for a similar design. A person purchasing a trust estate with full notice of the fraud may make a good title to a purchaser from himself without notice and *mutatis mutandis*. He may collude with a profligate husband or unnatural father in cheating the wife and children out of their lawful provision. And when the cestuis que trusts become capable and desirous of seeking redress for their wrongs, their remedy is a suit in Chancery and the personal responsibility of an insolvent trustee—a ruinous superannuated justice, and tardy restitution of—“no effects.”

Enough has now been said, it is hoped, to demonstrate the deficiencies both in principle and in expediency of the present structure of trusts. The institution of a public trusteeship would meet all the evils impeached. The commencement of a trust would be unequivocal and its transmission simple and inexpensive. Its multifarious duties would be performed with regularity by an experienced and unprejudiced person. The trust property would be guaranteed from waste and misappropriation. Family feuds would cease for want of a ground of contention, and in conclusion the Court of Chancery would be relieved of a vast quantity of scandalous and contemptible business, calculated to bring discredit on any judicial system.

T. W. L.

ART. II.—THE LIABILITIES IN THIS COUNTRY OF
FOREIGN SOVEREIGNS.

TWO decisions have very recently been made by the Court of Queen's Bench, which involve matter of so much importance to merchants and others having dealings of any kind with foreign crowned heads, as well as interest to the profession, both from their bearing on that subject and upon questions of the extent and nature of the custom of proceeding by way of foreign attachment in the ancient courts of the city of London, that we hasten to lay before our readers some observations on the law therein laid down. Judgment in both these cases was delivered on the 28th of May last. The short statement of the first of them is as follows.¹ Some time ago the present Queen of Portugal's government took possession of certain monies of A., then in the hands of his banker at Lisbon. A., finding that the Queen of Portugal has a sum of money in the hands of B., within the city of London, attaches the last-mentioned sum by means of the usual process of foreign attachment, issuing out of the Lord Mayor's Court. The queen moves for a prohibition, and the questions made are, whether the goods of a sovereign prince are liable to this process, and whether such process is available at all where the cause in the first instance arises out of the jurisdiction? The Court of Queen's Bench have decided both questions in the negative, relying in the first instance partly on the statute 7 Anne, c. 12, making void from the date thereof all process whereby the person of any ambassador, or of his domestic servant, may be arrested or his goods distrained or seized; and making all persons prosecuting, soliciting or executing such process violators of the law of nations and disturbers of the public repose, and subjecting them to such penalties and corporal punishment as the Lord Chancellor and the two Chief Justices, or any two of them, shall think fit; and partly on the circumstances attending the passing of that statute, which are thus treated in the judgment. "On the occasion of the outrage (the arrest for debt of the Russian ambassador) which gave rise to that statute, Lord Holt was present as a privy councillor to advise the government as to the fit steps to be taken, and with his sanction seventeen persons, who had been concerned in arresting the ambassador, were com-

¹ De Haber v. Queen of Portugal.

mitted to prison, that they might be presented by information at the suit of the Attorney-General. Can we doubt that in the opinion of that great judge the sovereign himself would have been considered entitled to the same protection, immunity and privileges as the minister who represented him?" Now, passing by the irregularity of a chief justice sworn (as was the fact) a privy councillor *for the occasion*, advising in the cabinet on the committal of parties whom he was afterwards himself to try, and whom he did try, and many of them being convicted of the facts, he reserved the question of law, how far the facts were criminal, to be afterwards argued before the judges,—*which question was never determined*,¹—let us observe that the whole question, whether the sovereign would have been considered entitled to the same immunities as his ambassador, depends not on Lord Holt's opinion, much less on any inference as to what his opinion might have been, if the case had arisen, but solely on the law of nations, which is part of the common law. Nevertheless, is it not obvious that the offence of these parties must have been, in the opinion either of Lord Holt or of the judges, or both, of a very slight character, otherwise a little more punishment would probably have been inflicted upon them than they actually suffered? They do not appear to have been punished at all, or even ever to have had judgment against them. Then the law of nations, as most lawyers know, is gathered from usage and authority, and common consent.² But the usage of nations at the time of the above-mentioned outrage, and long after, was to arrest ambassadors for debt, &c. much like other people. Vattel³ mentions a case of a foreign minister in France, in 1771, and nine years after the above event Count Gyllenborg, the Swedish ambassador to the court of St. James's, had his papers seized, and was himself arrested and sent home in custody on suspicion of a misdemeanor, notwithstanding the statute and the law of nations, which it professes to declare and confirm.⁴ Grotius, the father of the law of nations, lays down the rule with very considerable hesitation. "De non violandis legatis," he says, "difficilior est quæstio, et

¹ 1 Bla. Com. 255.

² Grotius, Prolegom. 40; Bynkersh. de Foro Legator. c. 3; Fennings v. Lord Grenville, 1 Taunt. 248; per Lord Stowell, Le Louis, 2 Dods. 241; Flad Oyen, 1 Robins. 140; Wheaton, pt. i. c. i. s. 7; and see 6 Beav. 45.

³ Bk. iv. ch. viii. s. 110, and another case of the ambassador of the King of Portugal, imprisoned for debt at the Hague in 1668, by order of a court of justice, of which Puffendorf was a member, is mentioned in the same place.

⁴ 5 How. Sta. Tri. 508; 2 Ward's Law of Nations, 548, and see a vast number of cases of arrests of ambassadors, mentioned 5 How. St. Tri. 479, 491, 492, 496, and the reason for ambassadorial privilege, 20 How. St. Tri. 1130, 1134.

variè a claris hujus sæculi ingeniis tractata," though he concludes on the whole for their irresponsibility, and for the exemption of their goods from attachment for debt, &c. Puffendorf only claims for them in very short and general terms the right of personal security.² Even with respect to the right to personal freedom from arrest of a foreign sovereign coming into another country on a visit of pleasure, authorities and writers on this kind of law are not at all agreed. Vattel says he cannot, in such case, be treated as subject to the common law, for the weak reason (as it seems to us) that it is not to be presumed that he has consented to such subjection.³ In Calvin's case, the Court, which consisted of all the judges and Lord Chancellor Ellesmere, laid down the law thus, "If a king of a foreign nation come into England, by the leave of the king of this realm (as it ought to be), in this case he shall sue *and be sued* by the name of a king, &c."⁴ Lord Langdale, in a case of considerable note,⁵ observed, "that no case had been produced in which, upon the question properly raised, it has been held that a sovereign prince, resident within the dominions of another prince, is exempt from the jurisdiction of the country in which he is; there was no precedent, no law, no evidence of the common consent of nations, no usage which can be relied on. It must be admitted that all the reasons assigned for the immunity of ambassadors are not applicable to the case of sovereign princes: it has been truly observed that an ambassador, if exempt from the coercive power of the law, in the country where he is, may nevertheless be compelled to submit to justice by his prince in his own country, but that if you exonerate the prince himself, justice fails altogether." But he concludes, "I think on the whole it ought to be considered as a general rule, in accordance with the law of nations, that a sovereign prince resident in the dominions of another, is exempt from the jurisdiction of the courts there;" and Wheaton lays down similar doctrine, citing authorities, however, which do not bear out his position.⁶ Ward says, a sovereign prince in a foreign country cannot be tried by the courts of that country, though he may, upon provocation,

¹ De Jure Belli et Pac. lib. ii. cap. xviii. s. 4—7, 9.

² De Jure Naturæ et Gent. lib. ii. c. iii. s. 22.

³ Vattel, bk. iv. c. vii. s. 108; and he treats as an absurdity the notion that a foreign sovereign who enters another country without permission may be arrested.

⁴ 7 Rep. 15 b, and see S. C. Moor. R. 803, showing this not to be Coke's comment, but the resolution of the court.

⁵ Duke of Brunswick v. King of Hanover, 6 Beav. 40, 47, 48, 51.

Law of Nations, part i. cap. ii. s. 10.

be proceeded against with open violence, in the same way as if he had remained at home and war had been declared against him.¹ Lord Abinger laid down that, as a general proposition, a sovereign prince cannot be made amenable to any court of judicature in this country.² Neither Grotius nor Puffendorf appear to have treated of this question; but Bynkershoek³ says, "Scio et in Geldriâ et alibi principes externos interposito arresto in jus vocari, ut adeo ea res in mores transivit ut tanquam de re liquidâ nunc equidem inter omnes videatur constare," having previously expressed an opinion that a foreign prince in another territory, doing any thing amenable to the criminal laws, ought to be warned to depart, like an ambassador,⁴ adding, "In causâ æris alieni idem dixerim; nam arresto detinere principem ut æs alienum expungat, quamvis fortè stricti juris ratio permetteret, non permittat tamen analogia ejus juris quod de legatis ubique gentium receptum est" (which we have seen does not apply); but he goes on to deny that the question can be decided by the law of nations, inasmuch as examples (he says) are wanting.⁴

Here are considerable varieties of opinion certainly; but whichever way the authorities may be thought to preponderate on the question, there can be no objection to examining it in another point of view. Lord Redesdale considered that to refuse a foreign sovereign the right of suing in our courts might be a just cause of war.⁵ But then the obligation of being sued does *in effect* follow of course. For certainly in case of an action in the common law courts a set-off must needs hold good against a royal as well as any other plaintiff by the statute; and in case of a suit in equity it has been decided by the House of Lords,⁶ that such a plaintiff stands on the same footing with ordinary suitors as to the rules and orders of the Court of Chancery, and is bound like them to answer a cross bill personally and upon oath. In the case of the King of Spain *v.* Mendizabal, Lord Eldon, C., made an order restraining the defendant from bringing an action at law,⁷ which order would have been idle if the defendant had no common law power of bringing such an action. Sir John Leach also distinctly laid down that a foreign sovereign or

¹ Law of Nations, vol. ii. p. 590, and Supp. 598, 599; so Zouch, Solut. Quæst. de Jud. Legat. 84.

² *Glyn v. Soares*, 1 Y. & Col. (Exch.) 698.

³ *De Foro Legator.* c. 4.

⁴ *De Foro Leg.* cap. 3. He mentions the case of a Duke of Mecklenburg arrested in Holland in 1693 for debt.

⁵ *Hullett v. King of Spain*, 2 Bli. N. S. 60.

⁶ S. C. 1 Cla. & F. 333; and see *Duke of Brunswick v. King of Hanover*, 6 Beav. 1.

⁷ *Per Sugden*, arguendo, 1 Sim. R. 101.

government could both sue and be sued in the courts of this country.¹ Even the judges who incline to draw the line more strictly, fully admit that where a foreign sovereign files a bill or prosecutes an action in this country, he may be made defendant to a cross bill or a bill of discovery in the nature of a defence to the proceeding which the foreign sovereign has himself adopted,² which surely admits the principle of responsibility to our courts; for it seems almost frivolous to say, that if A. sues B. the latter shall take advantage of that as an admission of A.'s liability to the jurisdiction, but that such admission shall not be good for the purpose of C.'s action; the admission, it would seem, if once made, is good for ever. At any rate by no judge or authority is it held as the Court of Queen's Bench held in the case we have referred to, that to sue a foreign sovereign was an insult. But is the summons to the debtor, which in the Lord Mayor's Court is a necessary preliminary form to obtaining a foreign attachment against the goods of the debtor in the hands of the garnishee and to which the above language was applied, anything but a mere form? Lord Mansfield thought not when he said, the rest of the court agreeing, that the very essence of the custom is that the defendant shall *not* have notice.³ In fact, attachment is not equivalent to arrest, for if it were it could not have been available against the goods of a corporation, which the legislature thought it was when they expressly exempted by stat. 9 & 10 Will. III. c. 44, s. 74, the stock of corporations created under that act from being "subject or liable to any foreign attachment by the custom of the city of London or otherwise."⁴ Attachment is a proceeding not *in personam* but *in rem*, and has been therefore likened to a confiscation in the Exchequer.⁵ Therefore it seems difficult to perceive how such a proceeding can be an insult to a foreign sovereign. Nor does it appear at all clearly to be any breach of the law of nations. Neither Grotius nor Puffendorf, the great masters of that lore, treat the question whether a foreign sovereign can be sued in the courts of another country, much less do they expound the law as to the liability of such sovereign's goods, locally situate in another country, to the payment of his debts. In fact, we believe it will be found that Van Bynkershoek is the only legist who has laid

¹ *De la Terre v. Bernales*, 1 Hovend. Supplem. to Ves. jun. 149.

² 6 Beav. 38.

³ *Tamm v. Williams*, 3 Dougl. 281.

⁴ See case of *Hamburg Company*, 1 Mod. 212; *S. C. Freem.* 207.

⁵ *Day v. Paupierre*, 18 Law J. (N. S.) Q. B. 270; *Bromley v. Peck*, 5 Taunt. 852; *Wood v. Thompson*, id. 851.

down anything on the subject; he says,¹ "*Quod ad bona externorum principum non una tamen omnium sententia est,*" but he states his full assent to the doctrine, that the property of a foreign sovereign is subject to the jurisdiction of the country in which it is; and he mentions instances as follows. The Elector of Brandenburg in 1628 had his goods arrested by a creditor by order of the States-General. Money belonging to the republic of Venice was attached in 1670 by a merchant of Amsterdam. Goods of the Duke of Mecklenburg were arrested in Holland in 1689 by a creditor. Goods of the King of Prussia were attached in 1716 by order of a Dutch court of justice. And Vattel² says generally, the "conventions and contracts which the sovereign, in his sovereign character and in the name of the state, forms with private individuals of a foreign nation, fall under the rules we have laid down with respect to public treaties." One of these rules is,³—It is a settled point in natural law that he who has made a promise to any one has conferred on him a real right to require the thing promised, &c. These passages however relate more directly to the second of the cases, *Wadsworth v. Queen of Spain*, which we mentioned as having been decided by the Court of Queen's Bench, but which differed very slightly from the former. However that court now holds that a foreign sovereign cannot be compelled to discharge a public debt due to a subject of Great Britain by any process in our courts; and that to institute such a proceeding against the goods of a foreign sovereign in the Lord Mayor's Court of the City of London is an insult; and finally settles a much vexed question by declaring that the process of foreign attachment is never applicable where the original cause of action between the plaintiff and defendant arose without the jurisdiction of the city. The last point is of great importance to merchants in the city, inasmuch as it very much narrows the applicability of the process, which, according to several strong authorities, was not so limited, although there certainly was authority, and that very high authority, the other way.

¹ *De Foro Legat.* c. 4.

² *Bk. ii. cap. 14*, s. 214. And see *Bodin de Republ. lib. i. cap. 8*, p. 135, to the same effect.

³ *Bk. ii. cap. 12*, s. 163.

ART. III.—THE SCOTCH BAR AND THE HOUSE OF PEERS.

FROM the following document our readers will learn that the Scotch bar have taken up the constitution of the House of Peers, as a court of appeal from Scotland, in right earnest. And we understand that at the meeting of the next parliament great exertions are to be made with a view of having effect given, in some way, to the recommendations of the Report, which, we believe, proceeds from one of the ablest and most distinguished lawyers of whom the bar in Scotland can boast. The proposal made must be a delicate and difficult one for the legislature to entertain, just, fair and reasonable though it must on all hands be admitted to be. But we have the pleasure to state that nothing has transpired, in the communications with government, to whom the Report has been submitted, calculated to discourage our friends in Edinburgh. The anomalous character of the existing system has been admitted, and we may even go the length of saying that the argument, derived from its having hitherto "worked well," has been allowed to afford no sufficient justification of the essential error and radical injustice of its principle. The Scotch bar are therefore sanguine that the Lords will, ere long, present such supreme judicial qualities, as will attract their confidence and command their respect. In reading this Report the English lawyer should know, that the Scotch bar, when met together in their corporate capacity, are a Faculty—they are termed "the Faculty of Advocates," and their chairman is called "the Dean of Faculty." Engaged in court, in the exercise of their professional functions, "they," in the words of Lord Brougham, "form the bar of that ancient kingdom." They are the bar, and thus they speak on the appellate jurisdiction.

"Extract from Minutes of Faculty of 10th July, 1851.

"The Dean present.

"The Dean stated that he had called the meeting for the purpose of directing the attention of the Faculty to the Bill, "to improve the Administration of Justice in the Court of Chancery, and in the Judicial Committee of the Privy Council," which had recently been introduced into the House of Commons.

"Mr. Inglis moved that a committee be appointed to consider the Bill, with instructions to report to another meeting of Faculty, to be held during the present session, which was seconded by the Solicitor-General, and unanimously agreed to.

"The following gentlemen were appointed members of committee, viz., the Dean of Faculty, the Solicitor-General, Messrs. Marshall,

Neaves, Inglis, T. Mackenzie, Penney, and Macfarlane. Mr. Inglis, Convener.

“Report of the Committee of Faculty, appointed on the 10th July, 1851, to consider the Bill ‘to improve the Administration of Justice in the Court of Chancery, and in the Judicial Committee of the Privy Council.’”

“The committee have bestowed as much time and attention on this subject as was consistent with the expressed desire of the Faculty for an early report.

“It is gratifying to be able to state, that the views which are now to be submitted as the result of the committee’s deliberation, were adopted unanimously, and without any hesitation.

“The committee think it unnecessary to say a word on the feeling now almost universally prevalent among the profession and the public, that the time has come when it is indispensable to the due administration of justice, that some provision of a permanent character shall be made for the future, to secure that the House of Lords, when sitting to hear Scotch appeals, shall receive adequate and sufficient information as to the law and practice of Scotland.

“The consideration of this subject has been forced upon the Faculty at the present time by a variety of circumstances—in particular, by the 15th section of the *Court of Chancery and Judicial Committee Bill*, now pending in parliament, and read a first time in the House of Lords, on Monday the 14th July, which provides for summoning the judges of the equity courts of England to assist the House of Lords, when sitting as a court of appeal in chancery cases.

“It is a novelty in practice to take the assistance of the equity judges on appeals, and it has been suggested, in a recent debate in the House of Lords, that a similar provision should be made for summoning the Scotch judges in Scotch appeals.

“Various other plans have recently been proposed for altering and amending either the constitution or the practice of the court of appellate jurisdiction, and there seems little reason to doubt that the whole subject will very speedily be discussed in one or both Houses of Parliament.

“It appears to the committee to be the duty of the Faculty, both to the profession and the public, to take a distinct position, and to suggest some means of obtaining what the committee have already stated to be, in their opinion, indispensable to the due administration of justice in the court of last resort.

“It is altogether impossible to deny, that there is a growing impression in this country that the arrangements under which Scotch appeals are heard and disposed of are unsatisfactory. The committee have reason to believe that in this view the Faculty generally concur. And they are bound to say, that they think the feeling would have been greater, but for the fortunate circumstance, that two very distinguished members of the House of Lords, who have for some years taken a part in the hearing of Scotch appeals, are well acquainted with the principles, and also, in so far as is possible in the case of English lawyers,

with the practice of the law of Scotland. But it would be obviously unsafe to rely on the continuance of such an accidental combination of legal acquirements in those who, for the time, may act as judges of appeal.

"For ensuring a due representation of the law of Scotland in the House of Lords, the committee find, on inquiry, that two proposals, and two only, have been at different times made.

"The Faculty are aware, that in the 6 Geo. IV. c. 66, provision is made for summoning the Scotch judges in the trial of peers, for crimes or offences committed in Scotland, before the High Court of Parliament, or the Court of the Lord High Steward. In the year 1834, Lord Brougham (then Chancellor) introduced a bill into the House of Lords for regulating the exercise of the appellate jurisdiction, in which this provision, or one conceived in similar terms, was made applicable to Scotch appeals. In 1842, Lord Campbell introduced three bills, one of which contained a clause providing for the summoning of the English equity judges, and upon that occasion his lordship is reported to have said,¹ 'I have not ventured to include the Scotch judges, on account of the distance of their residence; but it may be matter for future consideration whether they ought not to be included.'

"On the other hand, a proposal is said to have been made in 1825 or 1826, in the time of Lord Liverpool's administration, to give to some Scotch lawyer of eminence a seat in the House of Lords, but whether as a member of the House, or in the capacity of an assessor, the committee do not know. They believe, however, that the design has been so far matured, that the Right Hon. Charles Hope, late Lord President, was selected as the person to fill the new office. This proposal was repeated about the year 1834, when it was understood that the late Lord Corehouse was intended to be selected.

"The committee are not aware, that any other project has ever been formed, or at least publicly proposed, for attaining the end now in view; and they do not feel themselves in a condition to make any new suggestion. They will, therefore, confine themselves to a consideration of the two plans above mentioned.

"The committee are of opinion that the summoning of the Scotch judges to assist at the hearing of Scotch appeals is neither expedient nor practicable. In the present condition of the Scotch courts, when the judicial establishment has been reduced to the lowest point consistent with the business of the country being carried on with reasonable despatch, it would be quite impossible to provide for the temporary absence from Scotland of any one or more of the judges, without seriously disturbing the progress of business, and inflicting great injury and hardship on suitors. For this reason the committee think the plan impracticable. But farther, considering, that most of the important causes which are carried to appeal, are decided either by the whole court, or after a consultation of all the judges, it appears that the learned judges are, in some degree, disqualified for the performance of the duty for which they would be summoned, seeing that they have judged, or at least formed opinions, on the merits of the

¹ Hansard, vol. 60, p. 1247.

causes appealed, when they depended in the court below. There is the high authority of Lord Brougham for holding this to be a disqualification; for in introducing the bill of 1834, already mentioned, his lordship remarked,¹ 'It was necessary that the judges of the court of appeal should not be those whose decision was appealed against.' And in a recent case² the same noble and learned lord took occasion to explain and enforce the objection at much greater length. For the reason now stated the committee think this plan inexpedient.

"But the Committee have arrived at an opposite conclusion, as regards the proposal, that a Scotch lawyer of the highest standing and eminence should be appointed to assist the House of Lords in the hearing of Scotch appeals. It is not for the Faculty to deal with the mode in which this proposal may be carried into execution, or to consider whether the holder of the new office should sit in the House of Lords as a member of that high tribunal, or in what other capacity. But, throwing out of view these matters of detail, the committee are clearly and unanimously of opinion that such a judicial appointment is well calculated to attain the very important object in view.

"An objection has been suggested to the arrangement now proposed, on the ground that the hearing, or assisting in hearing Scotch appeals in the House of Lords would not afford sufficient occupation for the learned person appointed to this duty. The committee think the objection admits of a very easy and satisfactory answer. They are far from wishing that the judge who is to assist the House of Lords in hearing Scotch appeals should discharge any judicial functions in Scotland. On the contrary, they believe that the judgments on appeal, in which he might take part, would command higher respect and confidence, if he were altogether removed by residence from the possibility of local influence. But although the sphere of this judge's duty might be thus confined to London, the committee do not think it by any means follows, that his attention must necessarily be confined to Scotch appeals. They have been very much misinformed, if a Scotch lawyer of such eminence and ability as could alone be appointed to the office would not be welcomed as a most valuable co-adjutor to the House of Lords in all their judicial business, and still more as a member of the Judicial Committee of the Privy Council, in the trial of many cases which come before that tribunal involving the consideration of foreign, international, colonial, and consistorial law, for which it is not presumptuous to say, that the education of a thoroughly accomplished Scotch lawyer peculiarly fits him. Nor is it to be forgotten, in dealing with this objection, that a person so qualified, and occupying such a station, might with great propriety and benefit take a part in what may be called the legislative business of Scotland.

"Upon the whole, therefore, the committee, while they would maintain unimpaired the Appellate Jurisdiction of the House of Lords, consider some change in the mode of dealing with Scotch appeals to be imperatively called for, and recommend to the Faculty the proposal

¹Hansard, vol. 25, p. 1258. ²Norris v. Cottle, 6 Railway Cases, p. 327.

which they have endeavoured to explain as the best remedy for the existing evil which has hitherto been suggested, and of which the nature of the subject admits.

"It will be for the Faculty to consider, in the event of their approving of this Report, what course of action they ought to adopt, whether by addressing themselves to her Majesty's Government, or to both or either of the Houses of Parliament.

"Signed, in name and by appointment of the Committee,

"JOHN INGLIS, *Convener.*"

"July 16, 1851.

"An adjourned meeting for resuming consideration of the foregoing Report having taken place,—

"It was moved by Mr. H. J. Robertson, seconded by Mr. Craufurd —That the Report of the committee be approved of, and that the Dean of Faculty and the Convener of the Committee be requested to proceed to London, in order to take such steps in reference to the Bill now pending in the House of Lords, as may seem to them best calculated to follow out the recommendations of the Report; and that the committee be re-appointed, with powers to take such other steps as they may think necessary for promoting the objects in view."

This document has been extensively circulated in Scotland, and we have been informed that the strongest feeling prevails there on the subject, not only among the members of the legal profession but also among the public generally. Educated men of all parties are agreed that the time has come when here, as in other of our imperial arrangements, there must be "law reform." It cannot be disputed that the Report comes before us with the highest professional authority and under the most important legal sanctions. The significant fact that the bar, as the Report tells us, are here *unanimous*, joined to the truth and righteousness of the cause, and the undoubted feeling of the people, invest the movement with every authoritative and influential circumstance, entitling its numerous and unanimous supporters to willing, patient, and respectful attention.

The origin of the right of appeal from the Court of Session in Scotland to the British House of Lords is hidden in the most perplexing obscurity. Mr. Macqueen in his book tells us nothing that is clear or satisfactory on the subject. But the jurisdiction must now be treated as an incontrovertible fact not open to inquiry, and which it is not less the duty of Parliament than the interest of the Scotch people to maintain unimpaired. The Scotch bar are anxious that it should be so maintained; and if they at the same time desire that it should be made as efficient as possible for its high purpose, they must have the assent and sympathy of every candid, well-informed, and reasonable man, whether learned or lay, in England.

ART. IV.—EMINENT MEMBERS OF THE BAR.

THE ATTORNEY-GENERAL.

WHEN Mr. J. Payne Collier, in 1819, collected into one volume his "Criticisms on the Bar," which had first appeared in the columns of the "Examiner," he declined to answer the objections to his publication made by barristers; admitting that "he had heard no objections seriously stated, and argued to the fitness of subjecting barristers to critical inquiry, except from barristers themselves." Since his day the spirit of the bar has improved. Every member, who was the subject of his criticism, has disappeared from the list of advocates; many have since adorned the bench; some still live to adorn the senate. Fair and honest criticism was found not injurious to a Scarlett, a Best, a Piggot, a Gifford, a Denman, a Copley, a Romilly or a Brougham. The false fear has given way to a sounder feeling,—the merits of contemporary leaders are freely canvassed, even among the barristers themselves, and there exists little prejudice and no reason against the notice by a legal publication of the rise and progress of successful living advocates; nor is there any cause why their vigour or their weakness should be left unchronicled till the subjects themselves have passed to the tomb. Much of instruction may be gathered from a candid and impartial inquiry,—much may be discussed whilst yet there exist the means of alteration or correction,—much may be commended without any fair charge of flattery being sustainable. That a member has been successful is of itself a *prima facie* evidence of professional as it is of other worth. That a man has risen to the head of his profession in the present day is at least a strong presumption that his worth and his talents are generally recognized. Moreover that a man without family ties or party connections,—with nothing but his ability and his zeal to recommend him,—should become under the Whigs the first law officer of the crown is confirmation strong of talents well applied. Not from his position alone then, but for the varied particulars of his career, we now select for notice and for comment her Majesty's Attorney-General, Sir Alexander James Edmund Cockburn.

In the year 1823, in his second year, Mr. Cockburn was a prizeman for the best exercises in English and Latin, and received the prize for English essays at Trinity Hall, Cambridge; in 1825 he was a fellow-commoner; he there attained the degree

of B.C.L.; and in 1829 became one of the fellows. In the same year he was called to the bar by the Society of the Middle Temple, choosing for his circuit the Western, and for his sessions the Devon. Of that society he is now a bencher.

Twenty years ago, junior barristers had as great a difficulty to be brought into notice at Westminster Hall as they have at this day; but sessions practice was then more abundant. The new law of settlement had not reduced parish appeals to a minimum. The sessions tried many cases which in practice have been more recently reserved for the assizes. Thus many juniors became well known at their district sessions, whose names even were never mentioned in the superior courts. The Devon sessions in particular had been famous for the strength of the bar, Follett himself having been the leader. It was a good school for men who were afterwards to rise; and we fancy that we see in the Attorney-General marks, not a few, of his western training.

Three years after his call, the Reform Bill passed, which completely altered the law, not only of the franchise, but as to the mode of ascertaining the right to vote; and the petitions, which followed the general election of the winter of that year, gave rise to a large number of new questions for the decision of the election committees, one of which alone occupied the attention of several. Had it been otherwise decided, and if the right of the committees of the House to inquire into the qualification of the voter had not been confined to the cases, which had been subject to the previous decision of the revising barrister at the revision courts, one of the most valuable changes made by the new law would have been rendered futile. The decisions of the election committees, subsequently to the reports of Messrs. Daniel and Corbett in 1821, had not been reported. The intermission had been "found to be productive of great inconvenience to the profession;" and Mr. Cockburn, in conjunction with another member of the western circuit, Mr. Rowe, now queen's counsel and recorder of Plymouth, undertook to begin a new series. In the preface they state that "they could have much wished to have followed the example of Mr. Douglas and Mr. Peckwell, in giving an introductory digest of the result and effect of the different decisions;" but the extent of the changes introduced by the new law, both in principle and practice, was so great, that no time was to be lost in publishing the most important points as they severally arose. Accordingly the volume was issued in parts, and we are left without that summary which the logical conciseness of one of the editors could well have supplied. Of the way in which these reports were composed,

we have a fair test in the contemporary reports of Perry and Knapp. Both are skilful abridgments of the evidence and of the arguments; but to Cockburn and Rowe's belongs the superior merit of perspicuity, without elaboration, and of greater facility of reference. The volume is less known than that of Perry and Knapp, because the latter has been continued in an uninterrupted series down to the parliament of 1847,—like the ten years' parliaments preceding the Reform Bill wholly neglected by the reporters, to the manifest injury of all future practitioners before the election committees,—whilst the work of Cockburn and Rowe ceased on the completion of a single volume.

The session of 1833 also brought Mr. Cockburn his first brief as a parliamentary counsel. On the 26th March, with Mr. Beavan as agent, he appeared as junior counsel for the sitting members for Coventry, Mr. Henry Lytton Bulwer and Mr. Edward Ellice, the secretary to the treasury; in the same session he was junior to Sir W. Follett in the Lincoln and Dover petitions, in each case for the sitting members. The cases were out of the ordinary run of petitions. In all three the qualification of the candidate was disputed, and no little legal ingenuity was required to show the legal qualification; whilst in the Coventry case the seats had to be saved notwithstanding the misconduct of the sheriffs, which was specially reported to the House, and notwithstanding the existence of serious riots. In all three cases the seats were saved, the questions as to the qualification had been argued by the leaders, giving little opportunity for any junior to display his ability. On the question of riot, however, and on the right of the sitting member to cross-examine a returning officer who was called only to produce the poll, the junior had the opportunity of showing the "stuff he was made of." The exertions of the advocate were not forgotten by the immediate client who had the power, and, as it proved, the inclination to reward. On the 18th July, 1834, the corporation commission was issued to inquire and report on the state of the corporations in England and Wales. Among the commissioners was Mr. Cockburn; and to him, in conjunction with Mr. Whitcombe and Mr. Rush-ton, the late police magistrate of Liverpool—than whom no one deserved and few obtained more lasting or more sincere marks of universal esteem—was assigned the North-Midland circuit, comprising, amongst others, the then notorious corporations of Leicester, Warwick and Nottingham. The task was not easy; the corporators were not facile in their proceedings; the acts of themselves and their predecessors, when exposed to public

view, would not stand the light of modern criticism or of more recent reforming notions; the task was, nevertheless, well performed. The general report of the commissioners, with the protest of Sir Francis Palgrave, is well known; and the three thick volumes of appendix containing the district reports, give a mass of information which could have been collected by no other means. The reports on Bridgenorth, Derby, Newark, Newcastle-under-Line, Retford, Stafford, Shrewsbury and Wenlock are the joint production of Mr. Rushton and Mr. Cockburn, and display a searching fulness and clearness, which we are inclined to ascribe largely to the painstaking carefulness of Mr. Rushton. The reports on Coventry, Leicester, Nottingham and Warwick are by Mr. Cockburn and Mr. Whitcombe. To Mr. Cockburn solely belong the reports on Bewdley, Kidderminster, Newport, Shropshire, Sutton-Coldfield, Tamworth and Walsall. They are drawn up with a scrupulous attention to impartiality; and whether the electioneering sale of the Bewdley seats be set forth in all its deformity, or the courtesy and openness of the Tamworth corporators be commended, there is a fairness and a firmness which well mark the character of the commissioner; yet the reports will not bear comparison with the joint productions in other parts of the district; they are less ample in some of their details, and they have evidently had less care bestowed on their composition.

His employment on this commission brought his merits prominently to the notice of Mr. Joseph Parkes, at that time the astute head of the parliamentary election agents on the side of the Whigs. A more acute client or a firmer friend no barrister could find; and, instructed by him, during the session of 1835 Mr. Cockburn appeared for the sitting member for Canterbury in the first petition, and for the petitioners in the second. He also held a junior brief, but had to pull the labouring oar in the New Windsor petition, acquitting himself with a quickness and tact which often carried the committee with him on points at least extremely doubtful.

During the same parliament the railway bills began to form a prominent feature, and to increase largely the practice of parliamentary counsel. The lion's share of the retainers undoubtedly fell to Mr. Austin; and no one will deny that his peculiarly persuasive manner, his dexterous dealing with hostile witnesses, and his quick perception of the prejudices or the weakness of each particular member of the committee, rendered him amply deserving of the "golden fee" which company after company poured into his clerk's accounts. The position of a counsel before the committees of either House is indeed pe-

cular : he needs more tact and manner than law, and more persuasion than eloquence. A barrister may succeed beyond all his competitors,

“ though some plead better, with more law than he ;”

yet there must be enough of eloquence to please and to convince ; enough of law to keep the evidence within reasonable bounds ; enough of experience to be able to refer with readiness to other decisions of other committees, and to known rules of practice there and elsewhere ; enough of firmness to restrain the private or party fancies of individual members of the particular tribunal ; enough of casuistry not to allow your opponent's case to break down the weak parts of your own ; and, withal, a dexterity in not allowing that casuistry to be detected ; and these qualities must be varied with each varying committee. Many of the modes by which a *nisi prius* advocate obtains his success are not only worthless but injurious. Distortions of fact are most dangerous ; appeals to the passions fail of effect ; declamation is utterly ruinous to the declaimer. The critical acumen of an accomplished arguer in banco, and the nice discrimination or distinctions of decided cases, are wholly out of place. Conciseness and logical accuracy, which tell upon the mind of a single judge, are lost within the four walls of a committee-room. Moreover, there are generally two or three members who really understand the question to be decided ; a few who fancy that they know more than all the others put together ; and many who think the whole affair a bore, and who neither know nor care to know much of the matter to be decided ; and in election committees, under the old system, when the “ brains had been knocked out ” by the respective agents, there was a party majority to contend with, when, to use an expression of a late honourable member, “ he had voted against his party on one division, and he would take care not to do it again.”

Such was the nature of the tribunals before which Mr. Cockburn appeared. Receiving a fair proportion of all the good things that fell to the lot of the “ lucky few,” he fully understood the character of these tribunals, and he as fully succeeded in doing justice to his clients. Occasionally there was shown a little infirmity of temper which told against him for the moment ; and though he was less dexterous at fence than some of his colleagues, and less forcible in attack, he had one most distinct and excellent qualification, “ undaunted courage ;” he was seldom to be foiled, never to be put down : his first employment in parliament was in defence of the seat, and his great character-

istic merit was in defence. Hopeless as others might think the retention of the seat, he was ready and willing to fight so long as he was instructed; and if bribery were the charge trumped up, as it not unfrequently is against the sitting member's agents, no counsel could more firmly or with more indignation resist it, or more effectively save the candidate from the indiscretion or vice of the agent. His conduct on the Great Marlow petition in 1842 is a case precisely in point. One of the counsel had commented strongly on the non-appearance of a lady of title, who was too ill to leave her room, to disprove a charge of personal bribery, and with a sneer had said that she need not have feared to appear as she would have been cross-examined by one of her own rank; Mr. Cockburn disposed of the case and the sneer by avowing that she feared neither the examination nor the examiner, and would as soon submit herself to the questions of the humblest member of the bar as of the "proudest bearer of an ennobled name." The retort did its work, the charge of personal bribery was quietly dropped. In the Taunton petition of 1838 he for the first time led the case, with Mr. Kinglake as his junior, and with his usual success defended the seat. He was in most of the English petitions of that year, including the memorable case of Evesham, where Sir Robert Peel was chairman, and Mr. Peter Borthwick was unseated after the receipt by a schoolmaster of a silver snuff-box, with the singular inscription, "*Ex dono amici sui, qui conducit*," or as Peel freely translated it, "The gift of his friend, who bought him." The election cases of this session are ably reported by Falconer and Fitzherbert, and will repay the perusal of those anxious to pursue this part of the subject further.

Now it was that Mr. Cockburn paid peculiar attention to the other branch of his profession, was diligent on his circuit, even leaving committees to be present at Exeter, and indicating his determination to be something more than a parliamentary counsel; a position profitable enough, but not one with which a counsel of ambition would rest content. He became also recorder of Southampton, and in this situation obtained the praise of the inhabitants: the little that fell to his duty was done with care and discrimination. In 1841 he obtained his silk gown, and profitably extended that accumulation of fees, for which the election committees of the following year, and the railway contests of the subsequent sessions up to the panic, afforded the most ample opportunities. For the legitimate reward of his toil he was neither too eager nor too careless. For the work that he did he expected and his clerk insisted on the proper honorarium: and so far particular was he that when

a brief for an election committee was ready for delivery, but the fee was not forthcoming, on the assembling of the committee on a fine Derby morning the parties found themselves minus their counsel; who acted on the good old saw, that "a man may as well play for nothing as work for nothing."

The year 1841 was otherwise fortunate for the reputation of Mr. Cockburn, and for the consequent future reward. He had now an opportunity of having his name brought most prominently before the public in a case of considerable importance, to which public attention had been largely attracted; and in which a knowledge of the principles of the civil and the common law were necessary to aid a relative who had been improperly deprived of the office of Dean of York. A full report of the proceedings in the visitatorial court of the Archbishop of York, held before Dr. Phillimore, as commissary, commencing in January, 1841, and continued by several adjournments to the 24th July, has been published, and a careful perusal of its contents has confirmed an opinion that the whole history of the courts in our own country affords no instance of a similar course of proceeding. The colloquies between the commissary and the dean were matters of curious comment at the time, and they lose none of their raciness after the lapse of years. The judgment of the commissary is of itself a rich treat: he declares that—

"Deeply impressed with the importance of the responsibility, I have brought to the consideration of the subject such lights as my previous habits of study and the practical experience of some years have enabled me to apply to it. I have endeavoured also to bring to the investigation of the question all the *patience and impartiality* I could command. I am *conscious of no bias*: indeed, if I had any, there are reasons (which it would be impertinent in me to mention) *a priori*, why it would be in favour of the dean."

Yet he had just before, in the same judgment, displayed his patience by saying, "you have all heard how this charge was met by Mr. John Singleton, how he shuffled and prevaricated, and disgraced himself:" and the bias in the dean's favour was manifested at the opening, by averring that—

"The chapter had fallen into a complete case of disorganization. Whether this was owing to the restless temperament of the dean—to his want of order and method in the arrangement and conduct of business—to his utter contempt of all forms—or to the inordinate pretensions he advanced as the head of the chapter, to the control and government of all other members of the corporate body, (of all which imperfections he has given us ample exemplifications in the course of the present proceedings); I say, whether it arose from these defects

in his character, or a combination of these with other causes, it is not material that I should stop to inquire."

The case was simply this : in the course of the visitation, and in answer to one of the articles of inquiry, one of the canons returned, amongst other things, that "the presentations to the vicarages in the dean's patronage are usually sold;" and thereupon the visitation was continued; evidence was taken in support of the charge of simony: though no regular monition or citation, or notice of articles, was served on the dean, who attended only to protest against the proceeding; having withdrawn, the case was declared contumacious and counsel for him was refused a hearing till the contempt was purged; no libel was propounded nor any attempt made to take proceedings to deprivation, according to the strict and regular course of ecclesiastical usage and law; neither was any notice taken of the then recent act of 3 & 4 Vict.; nevertheless, sentence of deprivation was pronounced by the archbishop on the 2nd April, 1841. In Easter Term of the same year, Sir William Follett moved for and obtained a rule nisi for a prohibition; and the matter came on for argument before the Queen's Bench in the month of June. There was a formidable array of counsel for the archbishop—the Attorney-General (Campbell), the Solicitor-General (Wilde), Mr. Dundas, and Dr. Phillimore, jun.; the argument lasted three days. On the second day Mr. Cresswell argued in support of the rule, and, as Mr. Cockburn rose to follow him, the court intimated a wish to postpone the further argument till next term. This would have been most injurious to the dean; and Mr. Cockburn urged strongly and at last obtained a postponement of the argument to the next morning, when he continued his argument. He insisted that there was no such jurisdiction in the archbishop as that which had been exercised in the case; but that even if the jurisdiction did exist, all the essentials of the administration of justice, all its necessary and established formalities, and even all its decencies, had been so utterly forgotten or disregarded, that the court would feel it a duty to issue a prohibition, and prevent further proceedings. His speech was acknowledged on all hands to be as able as elaborate, and to have met and disposed of the arguments in favour of the commissary made by Sir John Campbell and Sir Thomas Wilde. It wanted, however, a reporter. Coming at the end of long previous arguments, and in the midst of the anxious preparations for an impending election, the daily newspapers contented themselves with a few lines of summary, and though the profession at large were aware of the line of argument, toge-

ther with the skill and dexterity of the advocate, the authentic reporters do not give a line of the arguments: Adolphus and Ellis content themselves with a copy of the elaborate judgment of the Lord Chief Justice (Lord Denman); and the court not entertaining any doubt upon the question, did not direct the parties to declare in prohibition, but made the rule for the prohibition absolute, thus virtually restoring Dr. Cockburn to the Deanery of York.

In the next important case, and one in which the merits of the advocate became fully known, Mr. Cockburn was fortunate in having for the reporter a gentleman, who was of the legal profession, and to whom the merits of the advocate were not unknown. The speech was delivered on a Saturday, and, a day having elapsed, on the following Monday morning the speech appeared at full length in the "*Morning Chronicle*" of the 6th March, 1843, occupying ten columns, all written, as we happen to know, by the same hand, and containing more columns than was known on the press to have been given in one paper by one hand in a single day. That speech was delivered in defence of M'Naughten, who had shot Mr. Drummond, and in support of the plea of insanity. The excitement was great—the popular feeling strong—the prejudice vast. It was the firm belief of most that Sir Robert Peel was to have been the victim, and not his secretary. Sir Robert's own notion must have been strongly in favour of the same view of the matter, for he seldom left the House afterwards without the attendance of a policeman to his own home in Whitehall Gardens: the general sympathy was in favour of the premier and the sufferer: and the plea of insanity itself had been brought into something like disfavour, in the case of the pot-boy, Oxford. Moreover, Sir William Follett appeared for the crown. These were strong odds against an advocate, but the strength of his facts and his arguments was greater: and notwithstanding the prejudices of the jury, the force of reasoning prevailed—the unhappy man was saved from the scaffold: his subsequent conduct shows how correct that verdict was. The speech is remarkable for the delicacy with which the subject is approached and treated, and the sustained eloquence with which it abounds. In his exordium Mr. Cockburn says—

"I rise to address you on behalf of the unfortunate prisoner at the bar, who stands charged with the awful crime of murder, under a feeling of anxiety so intense—of responsibility so overwhelming—that I feel almost borne down by the weight of my solemn and difficult task. Gentlemen, believe me when I assure you that I say this, not by way of idle or common-place exordium, but as expressing

the deep emotions by which my mind is agitated. I believe that you—I know that the numerous professional brethren by whom I see myself surrounded, will understand me when I say that of all the positions in which, in the discharge of our various duties in the different relations of life, a man may be placed, none can be more painful or more paralysing to the energies of the mind than that of an advocate to whom is committed the defence of a fellow being in a matter involving life and death, and who, while deeply convinced that the defence which he has to offer is founded in truth and justice, yet sees in the circumstances by which the case is surrounded, that which makes him look forward with apprehension and trembling to the result. Gentlemen, if this were an ordinary case, if you had heard of it for the first time since you entered into that box, if the individual who has fallen a victim had been some obscure and unknown person instead of one whose character, whose excellence, and whose fate had commanded the approbation, the love, and the sympathy of all, I should feel no anxiety as to the issue of this trial. But alas! can I dare to hope that even among you, who are to sit in judgment on the accused, there can be one who has not brought to the judgment-seat a mind imbued with preconceived notions on the case which is the subject of this important inquiry. In all classes of this great community, in every corner of this vast metropolis, from end to end, even to the remotest confines of this extensive empire, has this case been already canvassed, discussed, determined, and that, with reference only to the worth of the victim, and the nature of the crime, not with reference to the state or condition of him by whom that crime has been committed, and hence has arisen in men's minds an insatiate desire of vengeance; there has gone forth a wild and merciless cry for blood, to which you are called upon this day to minister! Yet do I not complain. When I bear in mind how deeply the horror of assassination is stamped on the hearts of men, above all, on the characters of Englishmen, and believe me, there breathes no one on God's earth by whom that crime is more abhorred than by him who now addresses you, and who, deeply deploring the loss, and acknowledging the goodness dwelt upon with such touching eloquence by my learned friend, of him who in this instance has been its victim, would fain add, if it may be permitted, an humble tribute to the memory of him who has been taken from us; when I bear in mind, I say, these things, I will not give way to one single feeling—I will not breath one single murmur of complaint or surprise at the passionate excitement which has pervaded the public mind on this unfortunate occasion. But I shall, I trust, be forgiven, if I give utterance to the feelings of fear and dread by which, on approaching this case, I find my mind borne down, lest the fierce and passionate resentment to which this event has given rise, may interfere with the due performance of those sacred functions which you are now called upon to discharge. Yet, gentlemen, will I not give way to feelings of despair, or address you in the language of despondency. I am not unmindful of the presence in which I am

to plead for the life of my client. I have before me British judges, to whom I pay no idle compliment when I say, that they are possessed of all the qualities which can adorn their exalted station, or ensure to the accused a fair, a patient, and an impartial hearing. I am addressing a British jury, a tribune to which truth has seldom been a suppliant in vain. I stand in a British court, where justice, with mercy for her handmaid, sits enthroned on the noblest of her altars, dispelling by the brightness of her presence the clouds which occasionally gather over human intelligence, and awing into silence by the holiness of her eternal majesty the angry passions which at times intrude beyond the threshold of her sanctuary, and force their way even to the very steps of her throne. In the name of that eternal justice, in the name of that God, whose great attribute we are taught that justice is, I call upon you to enter upon the consideration of this case with minds divested of every prejudice, of every passion, of every feeling of excitement. In the name of all that is sacred and holy, I call upon you calmly to weigh the evidence which will be brought before you, and to give your judgment according to that evidence."

Then having referred to the various authorities on the subject of insanity, English and foreign, and to the leading cases, including Lord Ferrers and Hadfield's, the latter with the aid of Lord Erskine's advocacy, he drew this deduction,

"The observations which I have cited to you are the results of scientific inquiries; they rest for their basis upon experience; they are the observations of men who have no interests to advocate, who are likely to take no partial view, or be operated upon by any bias. They have held the calm light of science over this intricate question, and they have come to results which I have taken the liberty of laying before you, acting on the belief that they will afford you the best aid to guide you in this inquiry. What then, gentlemen, is the result of these observations? What is the practical conclusion of these investigations of modern science upon the subject of insanity? It is simply this, that a man, though his mind may be sane upon other points, may, by the effect of mental disease, be rendered wholly incompetent to see some one or more of the relations of subsisting things around him in their true light; and, though possessed of moral perception and control in general, may become the creature and the victim of some impulse so irresistibly strong as to annihilate all possibility of self-dominion or resistance in the particular instance; and this being so, it follows, that if under such an impulse a man commits an act which the law denounces and visits with punishment, he cannot be made subject to such punishment, because he is not under the restraint of those motives which could alone create human responsibility. If then you shall find in this case, that the moral sense was impaired, that this act was the result of a morbid delusion, and necessarily connects itself with that delusion,—if I can establish such case by evidence, so as to bring myself within the interpretation which the highest authorities have said is the true principle of law

as they have laid it down for the guidance of courts of law and juries in inquiries of this kind, I shall feel perfectly confident that your verdict must be in favour of the prisoner at the bar."

Next, he applied himself to the particulars of the extraordinary case before them; traced the conduct of the prisoner from his early days with a succinctness worthy of the emulation of the members of the Western Circuit at large, who have not profited by the example of Follett; and proceeded thus eloquently,

"That these fantasms long existed in that man's mind there is no doubt, before he at length sought relief by flight from this hideous nightmare, which everlastingly tortured his distracted senses. No doubt these delusions existed in his mind before, but it was not until he left his business that they were revealed to others in anything like a definite shape. And, gentlemen, you will learn from the medical authorities that it was natural for him, who became at last borne down by these delusions, to struggle against them as long as he could; to resist their influence, and to conceal their existence, until, at last, the mind, overwrought and overturned, could contain itself no longer, and was obliged to give form, and shape, and expression, 'a local habitation and a name,' to the fantasies against which it had struggled at first, believing it may be, for a time, that they were but delusions, until their influence gradually prevailing above the declining judgment, they at last assumed all the appearance of reality, and the man became as firmly persuaded of the substantiality of these creations of his own fevered brain as of his very existence. Therefore it is that, coupling all the communications subsequently made respecting this man, with the fact of his giving up his business under circumstances in which every inclination of his mind would have led him to continue it, I can understand that those delusions had been for a long time existing in his mind, first, in an indefinite and shadowy form, then assuming a vague outline, and afterwards growing and increasing until they became stamped with the character of reality; and I believe, gentlemen, that when all the facts are before you, you will have no hesitation in coming to the conclusion that such was the case. But to proceed with this painful history. In the year 1841, the prisoner had disposed of his business under the circumstances which have been mentioned, and then went to live at a house of a Mrs. Patteson. She will be called in evidence, and will give you a history of the prisoner from his infancy; she will concur with the other witnesses in telling you that a more mild and inoffensive man than he has shown himself, during the greater part of his life, does not exist. From this witness you will also learn the nature of the delusions under which the prisoner laboured, and to which I have already referred; she will tell you that shortly after he had taken lodgings with her, he left without notice or warning, and was absent a considerable time; and it will be seen that during that absence he believed himself to be the object and victim of the most unrelenting

persecution; that he imagined himself to be surrounded by persons who were attempting to injure him, and who had framed a conspiracy against his comforts, his character, and even his life, and that where-soever he went these persons still pursued him and gave him no rest either by night or by day. Wherever he was, these creatures of his imagination still haunted him with eager enmity, for the purpose of destroying his happiness and his life. Nothing, then, could be more natural than that a man under such a persuasion should attempt to escape from the persecution which he erringly imagined to exist, and to seek in some change of place and clime, a refuge from the tortures he endured. Alas! alas! in this man's case the question put by the poet of old, received a melancholy response,—

‘———— Patriæ quis exul
Se quoque fugit?’

‘What exile from his country's shore can from himself escape?’

“When he left his own country he visited England, and then France, but nowhere was there a ‘resting place for the sole of his foot.’ Wherever he went his diseased mind carried with him the diseased productions of its own perverted nature. Wherever he was, there were his fancies; there were present to his mind his imaginary persecutors. When he planted his foot on the quay at Boulogne, there he found them. No sooner was he landed on a foreign soil, than there were his visionary enemies around him. Again he fled from them, and again returned to his native land. Feeling the impossibility of escape from his tormentors, what course did he pursue? When he found it was impossible to go anywhere by night or by day to effect his escape from those beings which his disordered imagination kept hovering around him, what does he? What was the best test of the reality of the delusion? That he should act exactly as a sane man would have done, if they had been realities instead of delusions. And there is my answer to the fallacious test of my learned friend the Solicitor-General. He did so act; he acted as a sane man would have done, but he manifested beyond all doubt the continued existence of the delusions. He goes to the authorities of his native place, to those who could afford him protection, and, with clamours, entreats and implores them to defend him from the conspiracy which he told them had been entered into against his happiness and his life. Are we to be told that a man acting under such delusions, on whose mind was fixed the impression of their existence, and who was goaded on by them into the commission of acts which but for them he never could have committed,—are we to be told that such a man is to be dealt with in the same way as one who had committed a crime under the influence of the views and motives which operate upon the minds and passions of men under ordinary circumstances?”

Pursuing the inquiry down to the moment at which he was addressing the court, and indicating the evidence he would produce, Mr. Cockburn thus concluded,

“I think, gentlemen, I have sufficiently dwelt upon the autho-
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rities which can throw light on this inquiry. I trust that I have satisfied you, by these authorities, that the disease, partial insanity, can exist, that it can lead to a partial or total aberration of the moral senses and affections, which may render the wretched patient incapable of resisting the delusion, and lead him to commit crimes for which morally he cannot be held to be responsible, and in respect of which, when such a case is established, he is withdrawn from the operation of human laws. I proceed now to lay the evidence before you. In doing so I shall give my learned friend the Solicitor-General the opportunity of a reply. In this case it will be of considerable advantage, for he will have the opportunity of addressing you, and commenting on the evidence after it all shall have been given; whereas I can only anticipate what it may be. Many facts may be spoken to by the witnesses, many important observations may fall from them, on which I shall be deprived of all comment. The arguments which my friend's profound experience and his great legal acquirements may suggest are yet within his own mind. I can but dimly anticipate them. If any advantage should exist in such a case, surely it should not be on the part of the prosecution, but of the prisoner. And my learned friend, moreover, will have the immense advantage resulting from that commanding talent before which we all bow down. But I know that he will prolong to the end of this eventful trial that calm and dispassionate bearing, that dignified and appropriate forbearance which sat so gracefully on him yesterday. Gentlemen, my task is at an end. I have received at your hands, and at the hands of the court, a degree of considerate attention, for which I owe you my most grateful acknowledgments. I ought to apologize to my lords and to you for the length of time that I have detained you, but you know the arduous and anxious duty which I have had to perform, and you will pardon me. From the beginning to the end I have felt my inadequacy to discharge it, but I have fulfilled it to the best of my poor ability. The rest is with you. I am sure that my observations in all that deserves consideration will be well weighed by you, and I am convinced that the facts of this case, and the evidence adduced in support of them, will be listened to by you with the most anxious and scrupulous attention. You can have but one object, to administer the law according to justice and to truth; and may that great Being, from whom all truth proceeds, guide you in this solemn inquiry, that when hereafter the proceedings of the memorable day and their result shall be scanned by other minds, they may bear testimony that you have rightly done your duty, and what to you is far more important, that when, hereafter, in the retirement of your own homes, and the secrecy of your own thoughts, you revert to the part you have taken in the business of this day, you may look back with satisfied consciences and tranquil breasts on the verdict you will this day have given. Gentlemen, the life of the prisoner is in your hands; it is for you to say whether you will visit one on whom God has been pleased to bring the heaviest of all human calamities—the most painful, the most appalling, of all

mortal ills—with the consequences of an act which most undoubtedly, but for this calamity, never would have been committed. It is for you to say whether you will consign a fellow being, under such circumstances, to a painful and ignominious death. May God protect both you and him from the consequences of erring reason and mistaken judgment.”

The speech had its defects; the references to authorities were too much elaborated; it had nevertheless great force, and it spread wide the name of the speaker.

Four years afterwards, and during the prospect of a general election, it became known that Mr. Cockburn was a candidate for parliamentary honours, and was anxious to undergo the last test necessary for the attainment of the highest honours of his profession. He paid his addresses to the constituency of Southampton, professing those advanced liberal opinions which find favour with an increasing town like Southampton. It had been famous in election contests and election petitions; its fair fame had been clouded by practices not very seemly: a change had now come over the electors; the town was enlarged; the workshops were busy; the docks and the railway had rendered it important; and it vindicated its purity by electing Mr. Cockburn and another reformer, Mr. Wilcox, without a contest, on what is technically known as “a dry election.”

Lawyers of note are not very popular on their first entrance into the House of Commons. Many a man of eminence at the other end of Westminster Hall has made small progress in St. Stephen's Chapel. There are great living instances of this want of success. There is, in fact, a general distrust of their powers; it is too often set down by other honourable members, particularly country gentlemen, that a learned member is too prosy, too technical, and has too little sincerity; that

“On either side he can dispute;
Confute: change sides, and still confute.”

After a time, the prejudice in the case of some learned members wears off, but it must be after trials made in the House itself, and after the whole body has had an opportunity of judging of the parliamentary, as distinguished from the forensic, merits of the individual. The new member for Southampton was sufficiently experienced in the ways and the feelings of the House not to attempt taking it by storm. He was tactician enough to court and win, and not to overawe. He spoke on such subjects as came within the range of his profession; he spoke shortly and well: moreover, he advocated judicious and practical reforms in the administration of the law; he gained the ear of the House. For a full display of his powers as a

debater, he bided his time; he watched his opportunity. In the session of 1850, that opportunity arose, and was not lost. The Lords had passed a vote of censure on the government for the affairs of Greece. If the House of Commons had acquiesced in that vote, the Russell ministry was at an end; the honourable and learned member for Sheffield applied the touchstone by moving a direct vote of approval. It was thought that the division would be close, and much was at stake. The debate was conducted in a semi-legal manner, and lawyers were required to answer lawyers. Sir W. Page Wood made an effective reply to Sir F. Thesiger. Yet other speakers had to be answered. Application is understood to have been made to at least one learned member, who was indebted to the Whig party for professional advancement, to take part in the debate, and declined. The day and the chance had come for Mr. Cockburn, and the progress of the debate gave him a "foeman worthy of his steel."

At the close of the debate on the third night, after a long casuistical and very damaging speech of Mr. Gladstone, the adjournment of the discussion was moved by the honourable member for Southampton. Large expectations had been formed of his success; the House was well filled; his opponents cool and critical; his friends willing to hope, yet almost afraid to trust; when Mr. Cockburn, in a few sentences, set the minds of those friends at rest. Boldly, as he ever does, he grappled with and overcame his opponent's casuistry. Not only did he cover the foreign secretary from the attack, but he carried the war into the enemy's quarters, and delivered a speech which was pronounced excellent in its reasoning, its sarcasm and its irony—closely logical, but not pedantic; eloquent, yet not in the smallest degree inflated—most effective as a parliamentary harangue.

After commencing by a statement that by his cheer of Mr. Gladstone he meant in a parliamentary mode to say he was ready to accept the challenge of the right honourable gentleman, and was prepared to answer him, although fully conscious of the vast difference of ability and disparity of power between them, he thus proceeded to give a home-thrust to his adversary:—

"Having thus put myself right with the right honourable gentleman, I must take the liberty of saying this—that in all my experience I never heard such a series of misrepresentations and misstatements as those which were made by the honourable gentleman, and I will undertake to prove this assertion step by step and position by position, if the House will grant me its indulgence and forbearance. I

feel, however, the great difficulty in which I am placed in entering upon this debate. If I go into the details of the case for the purpose of showing the fallacies, both in the statements and arguments of the right honourable gentleman, I shall be told by-and-by—because I have the misfortune of belonging to a legal profession—that it was a *nisi prius* mode of conducting my argument. I think, however, that the manner in which the discussion of this subject has been conducted, both in this house and in another place, has given us abundant evidence that it is not those only who practise in Westminster Hall who are possessed of the power of arguing in *nisi prius* fashion; for of all the pettifogging proceedings which I have ever known during my experience this is the worst. It was so commenced elsewhere. If honourable gentlemen choose to introduce this subject to parliament, and make a grave accusation against her majesty's government, and then conduct it, not upon the great principles of national policy and national honour, but by raising questions of minute detail and technicalities, by grossly perverting facts and distorting evidence, and by an utter misrepresentation of what were the true principles that ought to govern this case, let them not be astonished if those who belong to the legal profession, whose habits are to criticise and investigate with logical strictness every species of evidence—to minutely analyze facts as well as study the broad principles of municipal and national law—stung to the quick by the manifest injustice of this proceeding, should rush into the discussion; and, above all, let not the charge come from them that the mere having those acquirements are treating the subject in a *nisi prius* manner."

Then pointing out the discrepancy between the recorded censure of the Lords which related exclusively to the affairs of Greece, and the arguments in the Commons' debate, which almost dropped the Greek question, and proceeded largely on the policy of the government with respect to the rest of Europe, he divided his own speech into the same branches. On the first, relating to the affairs of Greece, he maintained that, for an admitted wrong sustained by a subject, the government had a right, and it was its bounden duty, to interfere, it being the fundamental principle in the policy of all nations that it is the right and duty of a state to protect its subjects against injuries sustained at the hands of other states, or subjects of such states; that Rome had adopted the principle not in the period of universal dominion, but when she had to fight her battles for empire with other states upon almost equal terms; and that though British subjects living in foreign states sustaining wrong were bound to have recourse in the first instance to the tribunals of the country for redress, yet that in neither of the cases, which had led to the interference of this country, was there the slightest or most remote probability—looking to the law of Greece and the condition of its tribunals—that redress could be obtained from those

tribunals. He then reviewed the steps taken by Mr. Finlay without success to obtain compensation from the government of Greece. He went on :—

“ Well, then, Mr. Finlay could get no redress ; but the right honourable gentleman (Mr. Gladstone) says that he might have gone to the tribunals of the country. The tribunals of the country indeed ! They say, ‘ a little learning is a dangerous thing ; ’ but this is equally the case when applied to law. The right honourable gentleman possesses every quality which would have made a most brilliant advocate. He has eloquence unlimited, subtlety unrivalled, casuistry unexampled ; all he wants is a little knowledge of law. If he had not been a great statesman, he would have been a great lawyer, if he would only have condescended to put on the wig and gown, and acquire a little knowledge of the first principles of law. I would advise him, if he would accept of my humble advice, to confine himself to that science of which he is so great a master—politics—and not to meddle with law. The right honourable gentleman is ignorant of the fundamental principle of law—that a subject cannot sue the sovereign. That is the rule in every country, with the exception of this. And why is it not the law in England ? Simply because, by the established usage and magnanimous practice of this country, the sovereign, upon the petition of a subject complaining of a wrong sustained from the crown, refers it to the first law officer of the crown, and indorses upon the petition the important and solemn words ‘ let right be done.’ And upon that the sovereign condescends to submit herself to an equality with her subjects before the throne of law, and allows justice to be administered between her and the meanest of her subjects, and by the ordinary tribunals of the land. And thank God ! that we have tribunals and that we have judges who would administer the law between the sovereign and her subjects with as much impartiality, with as even a hand, and with as unbiassed a mind, as between any two ordinary persons. But is that the case in Greece ? ”

If the learned gentleman had been speaking in the present year he would have discovered Lord Campbell’s opinion that he had greatly understated his case, and that in no country and under no circumstances can the sovereign of any country, the head of the state, be rendered amenable, even by the seizure of his goods lying in any other, to the tribunals of that other country for contracts there made and there broken, or for liabilities there incurred. But we have discussed that question elsewhere, and return to Mr. Cockburn’s argument. He showed by our minister’s unanswered, and also by Mr. Gladstone unquoted, letter, that in the time of Lord Aberdeen redress was sought from the government of Greece ; that the king was irresponsible civilly and politically, and that the officers of state were not responsible, because the matter occurred before the

constitution, by which alone even they became responsible and were called into power. In a manner equally clear he proved the case of the English government in interfering for Pacifico, who had been injured, and was entitled to redress; who had tried for that redress in a criminal court against the perpetrators of his injuries, who were let loose; after deriding Mr. Gladstone's notion that pecuniary redress could be obtained from suing for damages, a mob, "a rabble of brigands, vagabonds, and ruffians in rags and tatters,"—an experiment which even in England was not adopted by his grace of Northumberland when Nottingham castle fell in flames, or by the gallant Marquis of Londonderry when his house in St. James'-square was attacked—he demonstrated that no redress could be obtained in the courts of law, where no lawyer dare appear for the claimant and put himself in opposition to the will of the prime minister of the country; and where judges were nominally independent, but were in practice suddenly dismissed without reason assigned. He then gave a harrowing account of the actual modes of proceeding and of punishment in the Greek courts, although forbidden by a constitution worth not so much as the paper on which it was written—"set aside, violated, outraged in every respect and in every way." The speaker then passed from the particular to the general question which had been raised by the debate; he went fully into the charges made against Lord Palmerston, of interference in the concerns of foreign countries; and vindicated the policy pursued in relation to Spain, to the disputes between Naples and Sicily, and to the disputes between Austria and Lombardy. The following extract, which is of peculiar interest at this moment, particularly among the learned gentleman's constituents, will suffice to show the tone and spirit of this portion of the speech. Speaking of the futile negotiation for the settlement of the affairs of Piedmont and Mr. Gladstone's charge that it ought to have gone further, Mr. Cockburn thus proceeds—

"If it had gone further—if you had stopped the king of Piedmont—if you had interfered on the right side—for there is the gravamen of the charge; it is not that you interfered, but that you interfered in favour of constitutional liberty—if, said a noble lord in another place, if you had interfered to stop the king of Sardinia from marching into Lombardy, Austria would have had no difficulty in putting down the insurrection there—then the victorious troops would have had no difficulty in marching eastward and putting down the insurrection in Hungary, and thus the intervention of Russia would not have been required. But have you no sympathies for the Italian people? Can you not recall the eminent greatness and glory of the people—their mediæval splendour—their renown in arts and arms,

and all those imperishable monuments of human greatness which they have reared? Do these things not touch your hearts? Have you no sympathy for the people—if they, who for so many years have been degraded under the leaden rule of Austria, thought that at last the day of their regeneration had arrived, and the establishment of that nationality, which in their dreams they had pictured as rivalling the glories of ancient times—have you no sympathy for these people? Do you prefer that Radetzky, with his Teutonic hordes, should pillage their houses and drive the best and noblest of their sons to those horrible dungeons, those *carceri du rissimé*, which have already filled Europe with horror, and turned that which was wont to be the garden of the world into a desolate wilderness and a desert? Are your sympathies with Austria against Hungary—that noble people who possessed a constitution as ancient as your own—whose nationality was secured to them by treaty upon treaty—who raised Austria at a time when that state was almost prostrate under a combination of the powers that sought the dismemberment of the empire, but who are now sought to be absolutely merged in the Austrian empire, and to become a subordinate portion of the Austrian people? They said, ‘we have our own laws and constitution—we have sworn to preserve them inviolate—we have before drawn our swords for you in the time of national peril—we must now draw them in our own defence.’ This was the people whom Austria attempted to put down, but she had no power to put down that gallant population. But there did at last occur the intervention of the barbarous hordes of Russia; and your sympathies are for the butcheries of Haynau—for his military executions—for his scourging of women; your sympathies are for these things, because you say that order is restored. The honourable and learned gentleman, the member for Abingdon, fancies in his ingenuity that he can change things by changing names, but he is marvellously mistaken. Tyranny, absolutism, despotism, do not change their character because you call them order. Liberty, freedom, constitutional rights, do not change their character because you call them republicanism. No, sir, these things will not deceive the people of England. The cause is the cause of civilisation and humanity all over the world. The question is, whether you will have absolutism on the one hand or constitutional government and freedom on the other; and don’t flatter yourselves, because for a time a despotic government has prevailed—because order, as you call it, is restored in Europe—because the spirit of Hungarian liberty has been extinguished in the blood of the best and noblest of her sons—don’t fancy that such a state of things is to last. There is not a drop of the blood that has been spilt that does not call to Heaven for vengeance. The generation that is to come, whose fathers have been gibbeted, and whose mothers have been scourged, they will avenge these atrocities. And you who complain of interference—you who complain that her Majesty’s government has interfered in this case and in that—what do you say to the intervention of Russia—what do you say to the intervention of France? Who extinguished the liber-

ties and constitutional rights of Hungary?—Russia. Who restored the old, worn out and effete government of the Pope and his conclave of cardinals at Rome?—France. What right have Russia and France to take umbrage at the noble lord, because he has interfered in favour of constitutional liberty, while they interfered in favour of arbitrary power?"

This speech was delivered on the 28th of June: the government had a majority: and on the 12th of July a new writ was moved for Southampton in the room of Mr. Cockburn, who had been appointed Solicitor-General. Thus within three years from his first appearance in parliament he attained the first great step of office: the electors unanimously confirmed the ministerial choice as they did when, within another twelve-month, on the elevation of Sir John Romilly to the Mastership of the Rolls, the Solicitor-General succeeded to the superior office of Attorney-General; an office which has been raised from the contempt, into which it had fallen some thirty years since, by the successive abilities of Denman, Campbell, Follett, and Jervis; to the last of whom belongs the high credit, not only of conducting in a time of great excitement a series of political prosecutions, like Sir J. Campbell, with singular and uniform success, but of having at the same time conciliated public opinion and avoided the slightest charge of party persecution; who in addition to the heavy routine duties of his office sacrificed his strength, whilst he benefited largely the public and the ministry by the assistance he rendered both to the Home and to the Colonial Secretaries; and who, in the office of counsel to the Treasury, has left for the assistance of his successors a gentleman (Mr. Welsby) whose sound legal acquirements are known to and appreciated alike by the bench and the bar. Of the aptitude of Sir A. Cockburn for the duties of his new office it is yet too soon to judge. In the chief case which has come before the courts—the prosecutions by the Customs of the Dock Companies—the conduct of the case for the crown was beset with difficulties, and the crown counsel had to encounter the subtlety of Sir Fitzroy Kelly, and the unanimous hostility of the mercantile world. Of the opinions he may give on the cases submitted to him by the government, of the mode in which he may distribute the patronage which falls to his office, or on which he may be consulted, no materials for the formation of an opinion can thus early be before us. From his antecedents, however, we may express a confident belief that the merits which distinguished the rising advocate will mark the official career of the head of the English bar.

ART. V.—NEW LAW STATUTES OF THE SESSION.

IN resuming our summary of the legislation of the past session as it affects the procedure and practice of the courts of law and equity, we may begin by congratulating the country upon some very valuable and important additions to the Statute Book which have passed into law since the appearance of our last number. The voice of public opinion, for some time raised against the over-strict refinements which, in many instances, disfigured our system of legal procedure, and rendered it not unfrequently an engine of chicanery and oppression, has, we are happy to say, at length forced itself upon the consideration of parliament; and one or two highly salutary acts directed to this object have recently received the royal assent. We hail this as the beginning of a new era in our courts, when substance will be no longer sacrificed to mere form, and when the rights of the litigant parties will be disposed of more speedily and less expensively, but at the same time with an increased satisfaction and respect for the judgment of the law. It rests much with lawyers themselves to carry to a successful issue this good beginning, and we earnestly trust that the profession will see how greatly to its own interest it is to unite in the common purpose of facilitating the attainment of justice between litigant parties, and how detrimental to its welfare are those practices which have not undeservedly brought upon it the reprobation of persons who, viewing it from a distance, are perhaps better able to form a rough and practical estimate of its merits or demerits. In these days of increased progress, any obstruction to the advancement of the science of law ought to be unheard of; still less should it be possible to assert, with any appearance of truth, that such an obstruction is sanctioned by those who have, from their practical experience, the best means of appreciating the subject. While, however, we make these remarks, we think it right to enter our earnest protest against an accusation which has been, we fear in no friendly spirit, advanced against lawyers as a class. Wherever any disinclination to change has been found to exist in the profession, we are confident it does not arise, as is insinuated, from any fear of interference with the interests of the individual. It is with great regret that we hear such sordid motives seriously imputed to a body of men whose general character is so universally recognized. The more true reason may, we think, be sought in the habit acquired by every man's

mind of esteeming that mode of operation, with which he is practically and habitually conversant, as the one best adapted for the purpose, and consequently of feeling disinclined to engraft any great change into the existing system. Lawyers and judges, like other reasoners, come to look upon the determination of the rights of parties brought within their cognizance as an abstract science, and they are apt to reduce to strict rules what must ever in a great degree depend upon the varying circumstances of human life and action. Justice is itself immutable, but the subjects to which it is to be applied are constantly changing.

The method of applying the abstract principles of law to actual practice, or, in other words, the system of legal procedure, of necessity requires constant modification. *Tanquam clavus ejicit clavum*, one mode is found preferable to another, and the new course of proceeding will supersede that which went before. The great desiderata of a sound system of jurisprudence are the extraction of truth, and a reasonable certainty that the party really in the right shall succeed. It is to this object that all real law reform must be directed; and although we have had occasion in some recent instances to doubt whether the means devised for obtaining that end are the best calculated for the purpose, still any measures which fall short of actually thwarting that object, we are bound to receive and test, trusting that further experience will lead the legislature to a more correct knowledge of what is required to be done, and of the mode of doing it.

The first of the new statutes to which we shall advert, although it does not stand the earliest in point of date, is that for the amendment of the Law of Evidence in all courts and tribunals, civil or criminal. This is perhaps one of the most thorough and radical alterations in legal procedure which has occurred for centuries, and from its universal importance we place it in the foreground. There is no action or indictment, or other proceeding depending upon the examination of witnesses, which will not be directly affected by its operation. As will be seen, it works an entire change in the principles of evidence, as it has been for ages admitted in English courts of justice; and it extends to the superior courts an experiment hitherto tried only in those small tribunals which have been recently erected throughout the kingdom. It is not our province at the present moment to consider whether the change sanctioned by this statute be prudent or not. There is much diversity of opinion upon that point, and we have on a former occasion expressed our doubts whether the legislature may not have been too hasty in introducing into the superior tribunals a class of evidence which may possibly have been found

to work well in the County Courts, but which may still prove utterly unadapted to the trial of more serious and extensive rights. The mischief, if it exist, is already done, and it is only after a practical experience that the system can be now again altered by the legislature. However, this is one of those matters upon which it is scarcely possible for even the most experienced mind to form an *à priori* judgment, or to foresee what may be the ultimate consequences of an alteration so extensive as that of admitting the evidence of parties in their own favour in all suits and inquiries, of what nature or kind soever.

In order fully to appreciate the extent of this alteration, and to see its bearing upon the pre-existing practice, it will be necessary shortly to call our readers' attention to the former rules of evidence in this particular. The sole object of the law of evidence being to ascertain by the best and surest means the attainment of truth, it is obvious that every species of proof cannot properly be admitted. The question to be determined with reference to any proposed kind of proof is, whether, on the whole, its admission would be most likely to lead to truth or error. If the former, it should clearly be admitted in evidence; if the latter, it should as clearly be rejected. Acting upon these notions, our ancestors excluded several kinds of parol proof, i. e. proof by oral evidence, and held that witnesses were incompetent on various grounds, one of which was that of being interested in the matter at issue. The general rule therefore observed in criminal as well as in civil cases was, that a person interested in the event was not a competent witness in the inquiry. (See *Rex v. Williams*, 9 B. & C. 549.) The reason for this exclusion is thus stated by Chief Baron Gilbert in his *Treatise upon Evidence*, p. 122:—"When a man, who is interested in the matter in question, comes to prove it, it is rather a ground for distrust than any just cause of belief; for men are generally so short-sighted as to look at their own private benefit, which is near to them, rather than to the good of the world, which is more remote; therefore, from the nature of human passions and actions, there is more reason to distrust such biased testimony than to believe it."

If the interest of the witness were certain in its nature, he was thereby rendered incompetent, however small the amount of his interest; and therefore, in cases where this rule of law operated to prevent a person, who was able and willing to do so, from giving evidence in behalf of another, the mode of restoring his competency was by his releasing all interest in the matter at issue, and so removing the cause for exclusion. But there were other cases where the proposed witness had no *direct* interest in

the matter then litigated, but where he might obtain an *indirect* benefit, by subsequently using in his own favour the judgment obtained by his evidence. Here he was, on the ground already stated, considered as incompetent, because he had a bias towards that event, which would afterwards make in his own favour. In such a case it might be unjust to oblige the witness to abandon his own rights by a release, in order to further those of a stranger; and, on the other hand, it might be unfair to deprive the stranger of the benefit of his testimony. A security for such a witness giving impartial evidence would be obtained, if he were precluded from availing himself of the verdict gained through his evidence in any subsequent action brought by himself. Accordingly the statute 3 & 4 Will. IV. c. 42, s. 26, provided that in such cases the witness should be examined, but that his name should be indorsed upon the record, and that such indorsement should have the effect of for ever preventing the verdict or judgment so obtained from being admissible for or against him. This, which was the first general statutory interference with the rule excluding interested witnesses, was a means of restoring competency to a large number of witnesses who were before rejected. Still the general rule existed; and if a witness had a *direct* interest, which he refused to release, a party to whom his evidence was essential was unable to obtain it. At this juncture passed a second act of parliament, commonly known as Lord Denman's Act (6 & 7 Vict. c. 85), which enacted that "no person offered as a witness should thereafter be excluded, by reason of incapacity from crime or interest, from giving evidence, either in person or by deposition;" "but that every person so offered may and shall be admitted to give evidence, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, &c., or of the suit, &c., in which he is offered as a witness." But this enactment was restrained by the following proviso:—

"Provided that this act shall not render competent any party to any suit, action or proceeding, individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively."

This statute had the effect of rendering all persons competent as witnesses, except those who were the substantial parties to the record—the real actors in the suit depending before the court. As to these persons, the rule of exclusion was still pre-

served, whether they were or were not named in the proceedings before the court. The evidence of all other interested persons was thenceforth receivable in all judicial inquiries; all objections that could be raised to it, being now directed, not to its admissibility in the first instance, but to its credibility, when given before the jury or judge. The inquiry was thus transferred from a question of law to a question of fact.

The exclusion of a party to the record as a witness necessarily led to the double consequence that such a person was both unable to swear to the facts of his own case, and was also not compellable to give evidence in support of his adversary's case and against himself. So far as the latter result is concerned, it can scarcely be doubted that the rule was always productive of much more injury than of good. It seems to have originated, as is said by Mr. Phillipps in his *Treatise on Evidence*,¹ "from some apprehension of vexation or inconvenience which might ensue if a person were bound to prejudice or accuse himself." But it is obvious that much expense would be saved to an honest creditor suing for his debt, if he were able to put his debtor in the box and so oblige him to discover such facts as would support his case; while the possibility of false swearing would be much lessened in the case of an inquiry so limited as would thus occur. The practice in equity has always been to oblige a defendant to answer upon oath interrogatories put to him by the plaintiff, and although the mode of taking evidence in those courts places great impediments in the way of attaining speedy justice, this principle of discovery has generally been looked upon as one of the best portions of the system of Chancery judicature. In courts of law one of several plaintiffs was probably always *admissible* to give evidence in support of the defendant's case and against his co-plaintiffs, but he could not be obliged to do so, and the fact of his volunteering would most frequently have a disadvantageous effect upon the jury, and cause them to regard his testimony with suspicion; see *Norden v. Williamson*, 1 Taunt. 378.

The rule which excludes parties to a suit from giving evidence in their own favour and protects them from being called against themselves, extends also to the husbands and wives of the parties, who are rendered absolutely incompetent to give evidence either for or against those to whom they stand in that intimate relation. This extension of the rule is founded partly on public policy, which deems it necessary to protect the confidences of private life from inquiries of a hostile nature, and partly on that identity of interest which, if one is rejected, must

¹ Vol. i. p. 59.

necessarily reject the other also. Accordingly the husbands and wives of parties to the record were included in the proviso to Lord Denman's act, and, as we shall see, they are not rendered competent by the present statute. This omission is intentional on the part of the legislature, the House of Lords having wisely, as we think, refused to carry the admissibility of evidence to that extent which would permit a wife to be called upon to give evidence against her husband, or vice versâ.

Such being therefore the position of the law of evidence with respect to the admissibility of parties to suits anterior to the passing of the 14 & 15 Vict. c. 99, we will now turn to consider the provisions of that statute.

It commences in the first section with a recital of the proviso in Lord Denman's Act, which we have set out above, as far as and omitting the words printed by us in italics, and it enacts, that so much of the former act shall be repealed. The effect of this repeal would be to obviate every objection to competency on the score of interest, except in the case of the husband or wife of those persons who are nominally or substantially parties to the suit. But in order to obviate any objection being raised, that although the evidence of the parties was receivable, if they chose to tender it, yet that they could not be obliged by their adversaries to become witnesses, the second section enacts, that

"On the trial of any issue joined, or of any matter or question, or any inquiry arising in any suit, action or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action or other proceeding may be brought or defended, shall, except as is hereinafter excepted, be competent and compellable to give evidence, either *vivâ voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action or other proceeding."

The language of this section is very extensive. It includes every court of justice, superior or inferior, civil or criminal, within the realm. It comprises courts martial and committees of either house of parliament, and arbitrators who derive their powers from the consent of the parties, and it renders all that class of persons which was heretofore excluded not only competent witnesses, but also compellable to give evidence against themselves. It is scarcely possible to conceive any enactment which would make a more radical alteration in the mode of preparing cases for trial, or to foresee the full extent to which it may affect the hearing of causes. This statute comes into operation on the 1st of November (the day upon which this

Magazine is published), and applies to all trials and inquiries which take place on or subsequent to that day. It will therefore affect every civil cause henceforth tried in any superior court. It might have been as well if a clause had been inserted similar to that introduced into Lord Denman's Act of 1843, to the effect that nothing in it should apply to or affect any suit or proceeding commenced before the date of its passing. Some surprise will, we fear, be caused by this quasi-retrospective operation.

Among the effects which will be produced by this new medium of proof, the most beneficial will probably be the diminution of the number of causes which are defended upon mere speculation, or on the chance that the plaintiff may be unable, or have neglected to procure some piece of evidence essential to his case. Moreover, in those cases which do come to trial, the expense of procuring the attendance of witnesses to prove handwriting or the execution of documents will now be constantly spared, because the plaintiff may, by putting the defendant in the box, prove all these facts out of his mouth. But while these advantages are likely to result, we cannot shut our eyes to the fact, that there are disadvantages to be weighed in the opposite scale of the balance. A plaintiff will often tender himself as a witness to prove his own demand, and after swearing to his knowledge of the facts, will leave the case without other evidence in support of it. The defendant will then in his turn give a very different version of the same story, and it will be left to the jury to arrive at a conclusion between these two discordant statements, without the assistance which is so often afforded by corroborative or circumstantial proof. This consequence may well occur where both parties mean to tell what they believe to be a true story. The one may swear positively to a turning fact, which the other may from circumstances be unable to deny or to admit, but who in his turn may advance another fact inconsistent with his adversary's case. How are twelve common men, unaccustomed to weigh probabilities, to see their way through these discrepancies? And if this may happen where each party is honest-minded, how much is the difficulty enhanced if either chooses to strain his conscience but a little, and to add or colour a fact to suit his own view of the case? We much fear that the temptations to perjury will be thus increased, without any adequate security for its detection.

There is no clause in this act providing for the mode in which a plaintiff or defendant is to require the attendance of his adversary as a witness in the cause, or at what period such a summons is to be served. The parties will therefore have to serve a

subpœna either *ad testificandum*, or *duces tecum*, as in the case of an ordinary witness. We think, however, that it would have been better if it had been made necessary for either party to give notice to the other that he required his attendance, a certain number of days before the trial, as the knowledge of such an intention might often lead the party so subpœnaed to serve a counter-subpœna on his adversary, whereas he may now be too late to do so, especially if his adversary, for this very purpose, chooses to delay serving the subpœna until the last possible moment.

We saw that the general terms of section 2 of the act were restrained by a reference to after-contained exceptions. These exceptions are to be found in sections 3 and 4 of the statute.

3. "But nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself; or shall render any person compellable to answer any question tending to criminate himself or herself; or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband."

4. "Nothing herein contained shall apply to any action, suit, proceeding or bill in any court of common law, or in any ecclesiastical court, or in either house of parliament, instituted in consequence of adultery; or to any action for breach of promise of marriage."

The first of these sections embodies the principle which chiefly distinguishes the criminal jurisprudence of England from the practice of most other countries. It is a leading doctrine of the law of England, and one upon which much of the security and liberty which we enjoy depends, that every crime charged against a man must be substantiated against him by affirmative evidence, given by those who seek to prove his guilt. No question, except whether he pleads guilty or not guilty to the indictment, can strictly be put to a prisoner at the bar, who is carefully protected from answering any questions either explanatory or inculpatory of his conduct. Even admissions or confessions previously made by him are admitted with the greatest jealousy, and if there is any reason to believe that they may have been dictated by hope or fear—if they are not plainly and evidently spontaneous—our law refuses to hear them detailed. In criminal prosecutions on the Continent of Europe, a totally different system prevails. The prisoner, after hearing the charge read against him, is in the first instance examined in the presence of the jury as to his knowledge of the transaction in question. It

is the duty of the president of the court, instructed by the previous proceedings, to put questions to the accused with reference to the offence, often artfully framing the interrogatories with a view of entrapping him in his answer, and constantly exhorting him to state all that he knows of the matter. A substratum being thus laid, the witnesses are then examined, and the whole case is left to the jury. How diametrically opposed is this to the English system, where every man is presumed to be innocent until he be proved guilty; and where it is the recognised duty of every criminal judge to act as counsel for the accused person! It cannot be doubted that our method is more in accordance with the true principles of justice, which should ever be administered with care and caution, and is calculated to render judges even and dispassionate arbiters of the law; a result scarcely possible for those who assume the tone and part of advocates. At the same time, although of the two alternatives our course of practice is immeasurably the superior, it must be admitted that our rule of rejecting all admissions made by prisoners under any circumstances of possible inducement, is far too stringent. If it be clear that the statement has been dictated by some improper motive it ought to receive no credence; but we cannot help thinking that it would be better in all cases of doubt to receive the evidence with its accompanying facts, and to leave it to a jury to decide upon the whole view, whether they attach credit to it or not.

The exception in the fourth section is founded in the same policy which prevents husbands and wives giving evidence for or against each other. Proceedings instituted in consequence of adultery, or for breach of promise of marriage, must always involve inquiries into subjects of so private and confidential a nature, that it would be injurious to society to permit or compel those interested as principals to give evidence in courts of justice.

The next section of this statute to which it is necessary to call attention is the sixth, which provides that:

“Whenever any action or other legal proceeding shall henceforth be pending in any of the superior courts of common law at Westminster or Dublin; or the Court of Common Pleas for the county palatine of Lancaster; or the Court of Pleas for the county of Durham, such court, and each of the judges thereof, may respectively, on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same, or to procure the same to be stamped, in all cases in which previous to the passing of this act

a discovery might have been obtained by filing a bill, or by any other proceeding in a court of equity, at the instance of the party so making application as aforesaid to the said court or judge."

This is a most valuable addition to the machinery of a court of common law. Hitherto the instances in which a party to an action has been able to inspect any documents in the possession of his adversary have been extremely limited. In policy causes indeed the rule has long prevailed of obliging the assured to produce to the underwriters all papers in his possession relative to the matter at issue; but a practice so conducive to justice has unfortunately not been extended to other kinds of actions; the utmost that the courts have done being to give a defendant, who requires to see documents in the possession of the plaintiff, time to plead, in order to enable him to have recourse to a court of equity for a bill of discovery. It is surprising that so inartificial a course of proceeding should have been permitted to remain so long. Independently of the great increase of expense which is thereby entailed upon litigant parties, it is obviously impossible that a collateral question of this kind can be as satisfactorily determined by a court which has not cognizance of the whole of the subject-matter in dispute, as by that tribunal with which the final decision rests. Lord Mansfield, who took a wider view of our legal system than most of his successors, is reported to have said that, whenever a defendant would be entitled to a discovery, he should have it in a court of law without going into equity. This dictum, however consonant it appears to be with good sense, we find scouted by the Court of Exchequer in a recent case, where they complain that it has occasioned a great deal of trouble at chambers, being perpetually cited there as an authority for applications to inspect, and they express a regret that it is not corrected! ¹ *Errare meherculè malo cum Platone, quàm cum istis vera sentire.* Far preferable is the strong sense of the great founder of our commercial law, to the narrow trammels within which the learned barons have thought fit to confine the course of justice. Happily, however, this practice no longer rests upon the dictum of any judge, however eminent. We now have Lord Mansfield's opinion not only not corrected, but expressly sanctioned by the legislature, and we trust that the courts will exercise this power liberally and beneficially. We should have preferred to see the clause not restricted to cases where a bill of discovery would lie in equity, because we foresee that this will lead to minute inquiries, whether under the particular circumstances of each case the Court of Chancery would interfere or not, and will thus afford opportunities for refining

¹ See *Goodliffe v. Fuller*, 14 M. & W. 4.

away a most useful provision. It would have been far better if it had been broadly enacted that either party might inspect and take copies of all such documents in the possession of his adversary as are material to the questions at issue. The inquiry as to materiality would be simple and easily disposed of.

The remaining clauses of this statute are directed to the mode of proving certain documents of a public or quasi-public character. A former act, 8 & 9 Vict. c. 113, gave some facilities for proving some official documents and certificates, by enacting that they should be admitted in evidence, provided they *purported* to be sealed or signed as required by the acts making them evidence, without further proof being required of the genuineness of the seal or signature: and also that private acts of parliament, and other parliamentary papers, purporting to be printed by the Queen's printer, should be admitted without further proof of their authenticity. The present act extends this facility of proof to other documents. Section 7 has reference to all proclamations, treaties and other acts of state of any foreign state, or of any British colony; and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state, or in any British colony, and all affidavits, pleadings and other legal documents filed or deposited in any such court. These may now be proved by their mere production, if they purport to be sealed with the seal of the foreign state or colony, as the case may be, or with the seal of the foreign or colonial court, if it have a seal; or if not, by the signature of one of the judges certifying that there is no seal. In all cases the seal or signature proves itself. The dispensation with evidence of the seal or handwriting in these instances will doubtless much facilitate the proof of such documents. The same credit is by section 8 also to be given to the seal of the Apothecaries' Company, which heretofore required to be proved in all actions brought by apothecaries for medicines supplied by them. A certificate, purporting to be so sealed, is now to be deemed "sufficient proof that the person named therein has been from the date of the certificate duly qualified to practise as an apothecary." Some evidence of identity of the party producing the certificate must however still be given.

We have next some sections of general application, which provide that all documents which are admissible in evidence in England, without proof of the seal or signature authenticating them, or of the character or office of the person signing, shall be equally admissible in Ireland, and vice versâ; and also that all documents so admissible without further proof in England and Ireland, shall be equally admissible in any of the colonies.

Section 12 relates to the proof of ships' registers, copies of which, if proved to be true copies, were heretofore receivable in evidence. The present act, however, renders examined copies, or copies purporting to be certified under the hand of the person having charge of the original, sufficient proof of the register, and *prima facie* proof of all matters contained or recited in such register.

Section 13 is directed to reducing the expense of proof in criminal proceedings upon pleas of *autrefois acquit* or *convict*. The practice has usually been for the clerk of assize or clerk of the peace to make up the record of the former judgment, and to attend with it at the trial, as it has been necessary to produce the record itself. This obviously occasioned great expense and frequently much delay, which is now removed by substituting a mode of proof similar to that which has long been in use for the purpose of proving a previous conviction. The present clause enacts, that in such cases

“ it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient that it be certified, or purport to be certified, under the hand of the clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction and judgment or acquittal, as the case may be, omitting the formal parts thereof.”

Next follows a general provision, in section 14, that

“ whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted.”

This puts all public documents upon the same footing, so far as their proof is concerned, and renders it no longer necessary to produce the original document itself in any such cases.

In order to prevent fraudulent certificates being given in evidence, the statute makes it a misdemeanor, punishable by imprisonment for eighteen months, wilfully to certify any document as a true copy or extract knowing it not to be so, and also renders it felony wilfully and knowingly to counterfeit any seal or signature referred to in the act, or to utter any document

with such a forged seal or signature knowing the same to be false and counterfeit.

Lastly, there is a clause (sect. 16) enabling "every court, judge, officer, commissioner, arbitrator, or other person now or hereafter having by law or by consent of parties authority to hear, receive and examine evidence," to administer an oath to all witnesses legally called before them. This enactment will be extremely extensive in its operation, as it annexes to every tribunal, which has by law the right of examining witnesses, the power of administering an oath. It thus places committees of the House of Commons on the same footing as those of the House of Lords in this respect, and thereby does away with one ground of dissatisfaction felt at the mode of hearing evidence in the Lower House. Another effect of this clause will be to prevent the recurrence of such cases as *Reg. v. Halllett*,¹ where the court for the determination of crown cases reserved decided that an arbitrator appointed by consent of the parties under sect. 77 of the County Courts Act, had no authority to administer an oath, no such power being given by that act, and consequently that a party who swore falsely before him could not be indicted for perjury.

The next of the new statutes to which we shall call the attention of our readers is a most valuable one, passed for the purpose of shortening and simplifying the practice of criminal courts. We have on a former occasion referred to this measure, which was introduced, though ineffectually, into parliament during the session of 1850. We may hope, however, that the delay which has occurred has had the effect of obtaining for its provisions a more ample consideration, as we know that it has been the means of additional clauses being inserted in the present year. The very useful reforms effected by this act are due to the labours of Mr. Greaves, a gentleman peculiarly conversant with the criminal law of this country, and to whose edition of this and the other criminal statutes of the last session we gladly refer our readers, as, besides much information on the operation of these acts, it contains forms of indictments carefully settled in accordance with the new enactments.²

We proceed to give a brief outline of the contents of the act for further improving the administration of criminal justice (14 & 15 Vict. c. 100), the operation of which dates from the 1st

¹ 20 Law J. Rep. (N. S.) M. C. 197.

² Lord Campbell's Acts. By Charles Sprengel Greaves, Esq., one of her Majesty's Counsel, &c. &c. London: Benning and Co. We approve of the significance of the motto "*Auspicium melioris ævi*," which appears on the title page of this work.

of September, 1851. It commences with a recital, to the truth of which all those who have had any experience in criminal courts will bear witness:—"Whereas offenders frequently escape conviction on trials by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case; and whereas such technical strictness may safely be relaxed in many instances so as to ensure the punishment of the guilty without depriving the accused of any just means of defence." And it then proceeds, in the first section, to give to the court before which the trial shall be, power to amend all indictments (in which term is included, by the interpretation clause, inquiries, informations, presentments, as well as other criminal pleadings), whether for felony or misdemeanor, in respect of certain variances between the facts alleged and those proved by oral evidence, where such variances are not material to the merits of the case. The particulars in which these amendments are allowable are the following :

The name of any county or place stated in the indictment; the name or description of any person or body stated to be the owner of any property which is the subject of the offence, or stated to be injured by the commission of the offence, or the christian and surname of any person; the name or description of any thing; or the ownership of any property named or described in the indictment. In case of a variance occurring in any of the above particulars, the court may order the indictment to be amended instantly, upon such terms as to postponing the trial as shall be thought reasonable; and after such amendment the trial is to go on in all respects and with precisely the same consequences as if no amendment at all had been made. By a former act, the 11 & 12 Vict. c. 46, a power was given to criminal courts, on trials for felony, of amending variances between any matter *in writing* given in evidence and the statement of it in the indictment, but the present clause is much more extensive, and applies to all variances between the allegation and proof, not affecting the merits of the offence, in whatever way the fact alleged is proved. In order to appreciate the value of this clause, it is merely necessary to refer to any volume of the reports of criminal cases, or to Archbold's Criminal Pleading, title "Indictment." It is only surprising that a measure of such obvious benefit should have been so long delayed. Now, however, we trust to see criminal justice administered with a due regard to the substance of the offence charged, and our courts of assize and sessions no longer made the arena for hair-splitting arguments and refinements upon words, which were more worthy of the so-called reasoning of the schoolmen rather than the earnest inquiry touching the life

or liberty of members of the community. As long as our criminal code was marked by that severity which placed the life of a fellow-being in jeopardy for comparatively trifling offences, and so long as the mistaken policy prevailed of denying to persons accused of felony the privilege of being defended by practised advocates, it might be reasonable and proper that every possible shield should be thrown around those placed in so perilous a position. Verbal refinements might then appear to have some substantial meaning; at all events, it is not surprising that legislators then hesitated to dispense with formalities which might by possibility afford to prisoners some protection against surprise or error; but now that for many years the sanguinary character which disgraced our criminal law has been removed; now that, practically speaking, death is the penalty of but one single kind of offence; now that all prisoners are entitled to be defended by counsel on their trials; nay more, are, if the circumstances of the case call for it, enabled to obtain professional assistance gratuitously; now that criminal justice is thus administered, every reason for retaining these subtleties fails, and those rules which originally were intended to prevent injustice to the prisoner, not unfrequently become a source of injustice to the public and immunity to crime.

The inconveniences which arose from over-drawn strictness in criminal pleading were, indeed, most sensibly felt in the trial of the most serious charges; those where the life of the accused was at stake. This was produced partly by the very laudable desire, on the part of the counsel defending a prisoner for murder, to omit no possible chance of saving his client, by the aid even of a formal objection to the indictment. It was also partly due to the great difficulty which, from the nature of the case, frequently existed in determining exactly what was the precise mode in which the deceased met his death. For this reason indictments for murder often extended to great length, containing counts ringing the changes upon every possible mode of death to which the evidence could be fitted. Each of these counts were required to contain a precise statement of the instrument with which the blow was struck, its value, the hand in which it was held, the exact position of the wound inflicted, and its length and breadth, and also a statement that the deceased person was at the time "in the peace of God, and of our Lady the Queen." This ridiculous particularity of statement, however, *was never required to be proved*, and variances in the proof and the allegation in these respects were held immaterial. Still the omission of these averments might be objected to on

demurrer, or in arrest of judgment, and in respect to the mode of death alleged, it was always required to be substantially proved. To obviate these absurdities, occurring as they did in the most serious class of cases, section 4 of the present act provides a short form of indictment, containing all that is really necessary to be proved, in order to convict the accused of the crime of murder or manslaughter. The same short form may also be adopted to charge the offence in a coroner's inquisition.

"In any indictment for murder or manslaughter preferred after the coming of this act into operation, it shall not be necessary to set forth the manner in which, or the means by which the death of the deceased was caused, but it shall be sufficient in every indictment for murder to charge that the defendant did feloniously, wilfully, and of his malice aforethought, kill and murder the deceased; and it shall be sufficient, in every indictment for manslaughter, to charge that the defendant did feloniously kill and slay the deceased."

The 5th and following sections make a similar provision for indictments for "forgery, uttering, stealing, embezzling, destroying or concealing, or obtaining by false pretences any instrument;" in any of which cases, and also wherever it is necessary to make any averment as to any instrument, it shall be sufficient to describe the instrument by the name by which it is generally known, or by its purport, without setting out any copy or stating its value. This power has been for some years given in cases of forgery and uttering, by 2 & 3 Will. IV. c. 123; but, we know not why, the practice has still prevailed of setting out the instrument alleged to be forged or uttered *verbatim*, as well as describing it generally by name. Such a course adds greatly to the length of indictments, and ought not to be adopted now in any case whatever. Section 8 renders it unnecessary to allege or prove any intent to defraud any particular persons in any indictments, found after the passing of the act, for forgery, uttering, or for obtaining money under false pretences; but it is now sufficient to allege and prove that the accused did the act charged generally with an intent to defraud. This is quite reasonable, because the act is criminal if done with a fraudulent motive. There can be no sound reason for exempting a prisoner from punishment, because a fraud actually committed against A. is alleged to have been committed against B. This only affects indictments found since the act; therefore, if an old indictment alleging an intent to defraud A. B. be now tried, the indictment must still be proved as alleged.

The next section has a very important bearing upon those cases where it is doubtful whether the evidence will support a charge of felony, or will amount only to the misdemeanor of

attempting to commit the felony. As the law stood before this statute, if a person was indicted for a rape, (for instance,) and it turned out that the full offence had not actually been committed, but only attempted, or vice versâ, if he was indicted for assaulting with intent to commit a rape, and the full offence were proved to be perpetrated—in either event, the prisoner was entitled to go scot free on that indictment. See *Reg. v. Harwood*.¹ A remedy is provided for this by the 9th and 12th sections.

Section 9 is in these terms :

“And whereas offenders often escape conviction by reason that such persons ought to have been charged with attempting to commit offences, and not with the actual commission thereof: for remedy thereof, be it enacted, that if on the trial of any person charged with any felony or misdemeanor, it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not, by reason thereof, be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the said indictment; and no person so tried as herein lastly mentioned shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried.”

Section 12 also provides that

“If upon the trial of any person for any misdemeanor, it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court before which such trial may be, shall think fit in its discretion to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor.”

As the clauses which we have just extracted will have the effect of rendering acquittals upon indictments for felony, when the proof falls short of the full offence, less frequent, it has been thought proper to repeal that section of 7 Will. IV. & 1 Vict. c. 85, s. 11, which enabled juries to find prisoners guilty of common assaults upon indictments for felony, where the crime charged included an assault. Great difficulties occurred

¹ 1 East, P. C. 411, 440.

in the construction and application of that provision, as to which we need only refer to the notorious case of *Reg. v. Bird*,¹ in which the difference of opinion among the judges has been already noticed in a former Number of this Magazine. Much practical injustice was also found to be worked by it, as juries would, in the majority of trials for felonious assaults, ease their consciences by taking advantage of the statute, if there appeared the slightest ground for doing so. Still in one class of offences it has been thought right to retain a power somewhat similar to that given by the repealed clause of the 7 Will. IV. & 1 Vict. c. 85. By section 11 of the new statute on indictments for robbery (i.e. stealing from the person by means of violence, or putting in bodily fear), if it appear by the evidence that the defendant did not commit the crime of robbery, but did commit an *assault with intent to rob*, he may be convicted of such an assault and punished accordingly, and such conviction is to prevent his ever being again prosecuted for an assault with intent to commit the same robbery. This could not be done under the repealed statute, which justified a conviction only for a *common* assault. See *Reg. v. Reid*.²

The 13th section does away with a subtle distinction which not unfrequently caused a failure of justice. At common law, if goods or money were delivered to a clerk or servant for the use of his master, and the clerk or servant instead of giving them over to his master appropriated them to his own use, this was held not to be larceny, because the goods or money had never been, even constructively, in the master's possession, and so it could not be said that they were stolen from him, neither were they stolen from the third party, because he had voluntarily given up the possession of them. To meet such cases of criminal fraud, the 7 & 8 Geo. IV. c. 29, s. 47, enacted that embezzlement by a clerk or servant should be deemed to be larceny. Still, if upon an indictment framed under that statute, it turned out that the person accused was not employed to receive the money or goods which he had appropriated, or that in any other way the offence committed amounted to larceny, the prisoner was held entitled to an acquittal. The line of distinction between larceny and embezzlement was, under certain circumstances, very difficult to be defined, and therefore the clause to which we are now referring will be found highly beneficial. It provides that if upon the trial of any person indicted for embezzlement, as clerk or servant, it shall be proved that he took the property in question under such circumstances as

¹ 20 Law J. Rep. (N. S.) M. C. 70.

² *Ibid.* 67.

amount in law to larceny, he may be found guilty of larceny and punished accordingly; and vice versâ, a prisoner indicted for larceny may be convicted of embezzlement, if the facts proved warrant it. We shall more properly notice, in connection with this clause, the 16th and 17th sections, because they seem to flow as a consequence from the abolition of the technical distinction in point of proof between larceny and embezzlement. In order to obviate the difficulties which might arise in bringing home charges of embezzlement, the legislature, by the 7 & 8 Geo. IV. c. 29, s. 48, authorized prosecutors of such indictments to charge any number of distinct acts of embezzlement, not exceeding three, against the same employer, provided they were committed within six months. Now this was contrary to the ordinary rule of law, which prevents more than one distinct felony being charged in the same indictment, and consequently in cases of larceny, where two or more distinct acts of stealing were proved, the prosecutor was bound to elect upon which of them he would proceed. Since, however, a person *charged* with embezzlement may now be convicted of larceny, or vice versâ, it became necessary to apply the same incidents to indictments for one offence as for the other, and accordingly sect. 16 provides, that

“It shall be lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six calendar months from the first to the last of such acts, and to proceed thereon for all or any of them.”

And by section 17,

“If upon the trial of any indictment for larceny it shall appear that the property alleged in such indictment to have been stolen at one time was taken at different times, the prosecutor shall not by reason thereof be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than the space of six calendar months elapsed between the first and the last of such takings; and in either of such last-mentioned cases the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six calendar months from the first to the last of such takings.”

This latter section renders almost unnecessary that which precedes it, as it allows three distinct larcenies, committed within six months, to be charged in *one* count. This however does not extend to three distinct acts of *receiving* by the same prisoner, which it seems cannot be included in one indictment. It will

therefore be only competent to add a single count for feloniously receiving, and under it to prove one single act of receiving by the same person, according to the power given by the 11 & 12 Vict. c. 46, s. 3.

Returning now to the clauses which we have passed by, section 14 abolishes the technical rule of law sanctioned in *R. v. Messingham*,¹ that where two persons are jointly indicted for receiving stolen goods, knowing them to have been stolen, it is essential to prove a *joint act* of receiving them in order to convict both. Therefore if A. and B. were jointly indicted as receivers, and it were proved that A. received part of the stolen property at one time, and B. received another part at a distinct time, both could not be convicted; the prosecutor would have been bound to make his election between the two felonies proved. The 14th section provides a more reasonable practice, by enacting, that under such circumstances the jury may "convict upon such indictment such of the said persons as shall be proved to have received any part of such property."

Section 15 applies to the trial of receivers of stolen goods, or other accessories after the fact to felonies. At common law no accessory after the fact could be tried before the conviction of the principal, except he were indicted and tried at the same time with him. By the 7 & 8 Geo. IV. c. 29, s. 54, receivers of stolen goods were permitted to be indicted as for a substantive felony, whether the principal felon were or were not convicted or amenable to justice, and the same rule was, by 11 & 12 Vict. c. 46, s. 2, extended to the case of all accessories after the fact. Still, as the offence thus charged was a *substantive* felony, in those cases the doctrine of election applied, and two or more receivers or accessories after the fact could not be included in a conviction upon one indictment, if they appeared to have committed the felonious acts at different times.² The present clause prevents this necessity for several trials, by providing that any number of accessories, whether before or after the fact, or receivers, may be charged with substantive felonies in the same indictment, notwithstanding the principal felon be not also included therein, and be not convicted or amenable to justice.

Section 18 is inserted to prevent the recurrence of an absurdity to which the Court of Criminal Appeal felt itself driven in the case of *Reg. v. Bond*,³ where it was held (*dissentiente* Erle, J.), that if the jury found that a prisoner indicted for stealing

¹ 1 Mood. C. C. 257.

² See *Reg. v. Dovey*, 20 Law J. Rep. (N. S.) M. C. 105.

³ 19 Law J. Rep. (N. S.) M. C. 138.

sovereigns and half sovereigns, stole either sovereigns or half sovereigns, but they could not say which, the prisoner was entitled to his acquittal! This decision, which it is scarcely too much to say is disgraceful to the criminal law of any civilized country, can happily never again be drawn into a precedent, since we have it now expressly enacted, that,

“In every indictment in which it shall be necessary to make any averment as to any money or any note of the Bank of England, or any other bank, it shall be sufficient to describe such money or bank note simply as money, without specifying any particular coin or bank note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin, or of any bank note, although the particular species of coin of which such amount was composed, or the particular nature of the bank note, shall not be proved; and in cases of embezzlement and obtaining money or bank notes by false pretences, by proof that the offender embezzled or obtained any piece of coin, or any bank note, or any portion of the value thereof, although such piece of coin or bank note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to any other person, and such part shall have been returned accordingly.”

The 19th and three following sections refer to trials for perjury and subornation of perjury, in which more technicality has prevailed than in other species of indictments; insomuch that it has been very difficult to frame an indictment for such offences in which it has not been possible for an ingenious pleader to find a flaw. It was originally indeed necessary to set out the whole proceeding in which the perjury was committed as well as the commission or authority of the Court, in order that it might appear upon the face of the record that the false swearing took place in a judicial proceeding and before a person competent by law to administer an oath. However, by 23 Geo. II. c. 11, a substantial mode of setting out the offence, and of stating the authority of the Court before which the perjury was alleged to have been committed, was rendered sufficiently explicit in indictments for perjury or subornation of perjury. These provisions are now (by sects. 20 and 21 of the present act) re-enacted and extended to all cases of wilfully or corruptly taking or making any oath, declaration, certificate, &c.—in fact to all cases where by any statute the pains and penalties of perjury are to attach. It is, however, still necessary to insert categorically what are called the assignments of perjury, that is, a denial in the very words of the matter sworn to by the defendant; a clause dispensing with this unnecessary detail, and substituting a general allegation of the falsehood of the matters

sworn to, was originally inserted in the bill, but was struck out during its progress through parliament.

The power heretofore possessed by courts of justice to order the prosecution of any persons committing perjury before them required to be extended, so as to make it effectual to insure the due punishment of such offenders. The 19th clause confers very extensive powers in this respect. It enables

“the judges or judge of any of the superior courts of common law or equity, or any of her Majesty’s justices or commissioners of assize, nisi prius, oyer and terminer, or gaol delivery; any justices of the peace, recorder or deputy recorder, chairman or other judge, holding any general or quarter sessions of the peace; any commissioner of bankruptcy or insolvency; any judge or deputy judge of any county court or any court of record; any justices of the peace in special or petty sessions; or any sheriff or his lawful deputy before whom any writ of inquiry or writ of trial from any of the superior courts shall be executed,”

to direct any person to be prosecuted for perjury committed in any evidence or proceeding before them; and to commit him to prison or to take bail for his appearance at the next gaol delivery for the county in which the offence was committed, and to bind over any person to prosecute or give evidence against him at the trial; and to give the party bound to prosecute a certificate of the prosecution being directed by the court, which certificate is to be sufficient evidence of its having been so directed, and on the production of which the court trying the indictment is to allow the costs of the prosecution, unless such court shall otherwise specially direct.

In order to prevent the necessity of producing the record of an indictment upon the trial of which perjury is alleged to have been committed, sect. 22 provides that a certificate containing the substance and effect and omitting the formal part of such indictment, and purporting to be signed by the proper officer of the court, shall be sufficient evidence of the trial of such indictment.

We come next to three clauses referring generally to all indictments, and intended to prevent objections being taken for such defects of form as have hitherto been held fatal. Sect. 23 enacts, that it shall not be necessary to state any venue in the body of an indictment, except where a local description is required to be made, but that the jurisdiction named in the margin is to be taken to be the venue for all facts stated in the indictment; and where an offence is committed in a county of a city or town and is tried in the adjoining county, such county of a city or town

may be stated either in the margin, with or without the name of the county where it is to be tried, or in the body of the indictment, by way of venue.

Sect. 24 enacts, that no indictment shall be held insufficient for any of the following causes:—

For want of the averment of any matter unnecessary to be proved; for the omission of the words “as appears by the record,” “with force and arms,” “against the peace;” for the insertion of the words “against the form of the statute” instead of “against the form of the statutes,” or vice versâ; for describing any person by his name of office or other descriptive appellation instead of his proper name; for omitting to state the time when the offence was committed, where time is not of the essence of the offence (as it is in burglary, night poaching, &c.); for stating the time imperfectly; for stating that the offence was committed on a day subsequent to the finding of the indictment, or on an impossible day (as on the 30th of February), or on a day that never happened (as on the 29th of February, 1851); for want of a proper or perfect venue; for want of a proper or formal conclusion; for want of or imperfection in the addition of any defendant; for want of any statement of the value or price of any matter or thing, or the amount of damage, injury or spoil, in any case where these particulars are not of the essence of the offence. Some of these defects were by a former statute, 7 Geo. IV. c. 64, s. 20, rendered immaterial *after verdict*; they are now, however, together with some others not formerly cured even after verdict, made utterly immaterial, and cannot be taken advantage of *by demurrer or in any other manner*.

Sect. 25 imperatively requires that *all objections for formal defects* appearing on the face of the indictment shall now be taken by way of demurrer or motion to quash the indictment, before the jury are sworn, and not afterwards, and when such objections are taken, the court may forthwith order the defect to be amended, if necessary, and thereupon the trial is to proceed as if no such defect had appeared. This will practically put an end to all such formal objections being ever taken.

In order to appreciate the full change wrought by this act in criminal pleading, we annex a form of indictment as it may be now framed for larceny by a clerk.

Central Criminal Court, } The jurors for our Lady the Queen upon
to wit. } their oath present, that John Styles, three
pair of shoes, one coat, and a large sum of money, amounting to
£5, of the goods, chattels and monies of the master of the
West London Union Workhouse, feloniously did steal, take

and carry away, against the form of the statute in such case made and provided.¹

Under this the prisoner may be convicted of three several larcenies within six months, or of three several acts of embezzling any money of whatever denomination, not exceeding in the whole 5*l.*, committed against the person who at the time filled the office of master of the workhouse. A clause was inserted in the bill as it originally stood, enabling juries, upon an indictment for larceny, to find a prisoner guilty of obtaining the money or property charged to have been stolen by means of false pretences. This, which would undoubtedly be a great addition to the means already possessed of convicting offenders who are substantially found guilty of crime, was however thought to introduce too great a latitude, and it was feared that accused persons might be prejudiced by so considerable a variance between the offence charged and the offence proved in point of legal phraseology. While we are bound duly to respect this caution, we venture to predict that the success of the present limited experiment in abolishing nominal distinctions will justify its further extension at a future period.

The 25th section has reference to traverses of indictments for misdemeanor, as to which the 60 Geo. III. & 1 Geo. IV. c. 4, provided that such a traverse might be permitted in case the defendant had been committed less than twenty days before the sessions at which the indictment was to be tried. That provision is, however, repealed by the present act, which, in lieu thereof, enacts that,—

“No person prosecuted shall be entitled to traverse or postpone the trial of any indictment found against him at any session of the peace, session of oyer and terminer, or session of gaol delivery: provided always, that if the court, upon the application of the person so indicted or otherwise, shall be of opinion that he ought to be allowed a further time, either to prepare for his defence or otherwise, such court may adjourn the trial of such person to the next subsequent session upon such terms as to bail or otherwise as to such court shall seem meet, and may respite the recognizances of the prosecutor and witnesses accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent session without entering into any fresh recognizance for that purpose.” ●

This power of postponement will, no doubt, prevent any injustice being done to an accused person by his trial being hurried

¹ Mr. Greaves has suggested that it will be advisable in future to adopt the English idiom of placing the governing verb before the substantive, instead of adhering to the old form, which is literally translated from the Latin, and he has accordingly framed all his precedents in that manner.

on, while it will obviate the unnecessary expense and delay caused by a traverse as of right under any circumstances. The application for a postponement must, as in ordinary cases, be made after the defendant has pleaded, and courts will probably generally require the grounds of the application to be verified by affidavit.

The next provision is one relating to pleas of *autrefois convict* or *acquit*, in which it has hitherto been necessary to set out fully the proceedings upon the former trial. The 28th section of the statute has now dispensed with this formality, and enacts that, "it shall be sufficient for any defendant to state that he has been lawfully convicted or acquitted (as the case may be) of the said offence charged in the indictment." This clause, coupled with that in the Evidence Amendment Act, which we have already noticed, (14 & 15 Vict. c. 99, s. 13) enabling such pleas to be proved by a certificate of the conviction or acquittal, will work a very great improvement in the practice in such cases.

The last enactment in this very valuable statute has reference to the punishment of certain misdemeanors of a graver character than the ordinary class of such offences, and for which the court is upon conviction now enabled to award hard labour during the whole or any part of the term of imprisonment warranted by law. These misdemeanors are enumerated in section 29, and are the following :—

Any cheat or fraud punishable at common law.

Any conspiracy to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime, or to obstruct, pervert or defeat the course of public justice.

Any escape or rescue from lawful custody on a criminal charge.

Any public or indecent exposure of the person.

Any indecent assault or assault occasioning a direct bodily harm.

Any attempt to have carnal knowledge of a girl under twelve years of age.

Any public selling or exposing for public sale or to public view of any obscene book, print, picture or other indecent exhibition.

The only remaining statute which we propose to include in our present notice, is that which amends the law relating to the expenses of prosecutions and the apprehension and trial of offenders in certain cases (14 & 15 Vict. c. 65). The provisions of this act, although highly important, will not require so lengthened a discussion at our hands as that already given to the two preceding statutes. The 1st section of this act repeals so much of the 7 Geo. IV. c. 64, s. 23, as provides that *in cases*

of *misdemeanor* the power given to courts of ordering payment of expenses to prosecutors and witnesses, should not extend to their attendance before the committing magistrate. The effect of this is to place misdemeanors, so far as regards these costs, on the same footing with felonies, in which the attendance before the magistrate was always allowed to the prosecutor. As it is in general equally for the public benefit that offences of all classes should be duly investigated, the removal of this distinction, which frequently operated to deter prosecutors from coming forward and bringing misdemeanors to light, is highly to be commended. Still it is not in all cases of misdemeanor that the power of ordering payment of any expenses exists, and, of course, the attendance before a committing magistrate can only be allowed as part of the general expenses of the prosecution. In addition to certain classes of misdemeanors where such power heretofore existed, the 2nd section of this act confers it in the following cases (whether there be a conviction or not):—abusing girls between the ages of ten and twelve; unlawfully taking any unmarried girl under the age of sixteen out of the possession and against the will of her father or mother or other person having lawful care or charge of her; conspiring to charge any person with felony, or to indict any person of felony, or conspiring to commit any felony. In any of these cases it is now discretionary with the court before which the indictment comes to trial, to allow costs to prosecutors and witnesses as in felonies.

The next section relates to common assaults, in which there has been hitherto no power to allow the expenses of the prosecution. This not unfrequently operated hardly upon those who were bound over by the committing magistrate to appear at the assizes or sessions, because they were thus compelled to expend their time and money for the furtherance of public justice, without being able to claim any remuneration whatever. To remedy this, section 3 provides that wherever justices before whom a case of assault is brought, shall consider it a fit subject for prosecution by indictment, and shall bind the complainant and witnesses in recognizance to prosecute and give evidence at the assizes or sessions of the peace, every *such* court (i. e. as appears by reference to the preceding recital, the court before whom the indictment is tried) may at its discretion order payment of the costs and expenses of the prosecutor and witnesses so appearing (i. e. appearing at such assizes or sessions) under such recognizance, together with compensation for loss of time and trouble, as in the case of felonies. This clause is not by any means clearly worded, and it may be questioned whether it

would extend to ordering payment of these costs where a bill is thrown out by the grand jury, in which case the indictment has not been tried. At all events, where an indictment is removed by certiorari immediately it is found, there appears to be a very great difficulty in seeing how these costs can be awarded either by the court where the bill is found or by the Court of Queen's Bench under the defendant's recognizance, which is generally taken to extend only to costs incurred subsequently to the removal.

A set of clauses follow, which provide for regulations as to the rates and scales of costs, &c., being in future made by the Secretary of State instead of by the quarter sessions, and all allowances made by any court under this or any former act are to be ascertained with reference to these new regulations when so made. These new scales of expenses are not, however, to interfere with the power of any court to order payments to be made to persons who have shown any extraordinary courage, diligence or exertion in apprehending offenders, and the provisions of the 7 Geo. IV. c. 64, in that respect are by the present statute conferred also upon all courts of sessions of the peace, who may now order compensation for extraordinary exertions to the amount of five pounds.

This statute also enacts that clerks of the peace may, upon the recommendation of the justices of the county in quarter sessions, or of the town council of the borough (as the case may be), be paid by salaries in lieu of fees, such salaries to be paid out of the county rate or borough fund, with a provision that, if it is thought proper, any description of business may be excepted from the salary and paid for as before by fees. But when a salary has been fixed, no other payment is to be made for any business included in such salary, and all fees received in respect of such business are to be accounted for to the county or borough treasurer, as the case may be. This is in accordance with the present feeling, that officers of courts of justice should be remunerated by an adequate salary instead of directly by fees. We trust the day is not far distant, when no fees whatever will be payable by the parties immediately concerned in respect of the administration of public justice, whether civil or criminal.

The remaining clauses of the act are mostly of a local nature, and may be disposed of in a few words. The court of general or quarter sessions for the county of Middlesex is now put on the same footing as other quarter sessions with respect to the class of cases which it has jurisdiction to try, and also with respect to the power of dividing the court and appointing a deputy assistant judge, with these exceptions, that the

deputy so appointed must have been approved of by the Secretary of State, and must be a barrister of not less than ten years standing, although he need no longer be in the commission of the peace for the county of Middlesex. Moreover, the deputy assistant judge so appointed is competent to form a court in the absence of any of the justices, without however lessening in any way the jurisdiction of the justices who may sit with him in such additional court.

Provisions are also made for backing warrants for the apprehension of offenders in the Channel Islands by the bailiffs and chief officers of those islands, or their respective deputies in their absence.

Wherever prisoners, whose offences are triable only at the assizes, are committed from any county of a city or town which has not for five years previously had a separate commission of oyer and terminer and gaol delivery, to the gaol of such city or town, the commitment is to specify that the offender is committed pursuant to this act, and the recognizances are to be conditioned for appearance at the assizes for the next adjoining county (according to the schedule C. of 5 & 6 Will. IV. c. 76), and the cases of such prisoners are to be dealt with at the assizes in all respects as if they had been committed for offences perpetrated within such adjoining county. A similar provision is likewise made with respect to prisoners committed to any gaol or house of correction approved of as fit to contain prisoners committed for trial at the assizes for any county, instead of to the common gaol of the county; and, in either case, all prisoners so committed, either to the gaol of the city or town, or to any gaol or house of correction other than the common gaol of the county, are in due time to be removed, without any writ, to the common gaol, in order that they may be tried at the assizes, and such removal is not to be deemed an escape; and such prisoners are to be deemed to have been in legal custody during the time of such removal, and also during the time of their being removed back to the gaol from which they were brought, notwithstanding that they have been during that time taken out of the jurisdiction of the county &c. to which either of the gaols belong, and into a different county.

Such is an outline of the provisions of these statutes, a familiar knowledge of which is indispensable to all members of the profession who are practically engaged in carrying out the civil or criminal business of the country. We have gone at some length into many of their clauses, but we think that the importance and novelty of their contents will be our best warrant for having so long detained our readers with them.

If what is here enacted be carried out in the full and liberal spirit in which it has been intended by the legislature, we feel little doubt of these provisions commanding general satisfaction; and when it is seen—as we believe it will be—that accused persons in reality suffer no hinderance in defending themselves from charges brought against them by reason of the abolition of useless forms and tautology, but that the substantial ends of justice are thereby greatly advanced, we trust that parliament will in future sessions not hesitate to follow up the work which it has now begun, and will still further facilitate the trial of cases on their merits, by sanctioning such other improvements as may be found necessary to complete the work of Criminal Law Reform, now so well begun. We would also throw out a suggestion that, when so many fundamental alterations have now been introduced into this part of the legal system, and so many clauses and provisions of former acts have been repealed by the statutes passed within the last few years, it would be highly desirable to re-enact the whole of the existing criminal law in a single consolidated act. We regard as utterly impracticable, any scheme of codification which should attempt to define and express the *common law* applicable to offences; but there would, as it seems to us, be no difficulty in arranging the whole of the *statute law* within the compass of a single act, while the convenience which would result from such a proceeding would be beyond all question.

We shall in the succeeding number call the attention of our readers to such other portions of the legislation of the recent session as peculiarly affect the practice of the law.

H.

ART. VI.—CRIMES OF 1848, 1849 AND 1850.

Official Tables of Criminal Offenders for the Years 1848, 1849 and 1850.

Printed by Authority.

Census of Great Britain for 1851. Printed by Authority.

Education, National, Voluntary and Free. By Joseph Fletcher, Esq., H. M.

Inspector of Schools. London: Ridgway, 1851.

Reformatory Schools. Mary Carpenter. Bristol, 1851.

CRIMES have decreased these last three years; and run thus since 1847:—

	1848	1849	1850
Total	80,349	27,816	26,813
Decrease, per cent.	.. ..	8.8	3.6

This is gratifying, and concurs with that increase of prosperity which is well attested by financial and fiscal statistics of all kinds, in each branch of this busy, commercial empire. There has also been a quinquennial decrease of crime, for in the five years ending 1845 there were 139,505 crimes, but in the five years ending 1850, only 138,918, a decrease of no numerical importance, except that during the five years population increased by $6\frac{1}{2}$ per cent., and thus *criminality* decreased by about 7 per cent.

That able and accurate statist, Mr. Redgrave, thus analyzes, in his Preface, the criminal tables of 1850:

The decrease of the commitments in 1850, as referred to locality, has been very general. It extended to twenty-eight of the forty English counties, and includes all the Midland, Southern and Western counties, without exception. The increase has fallen in the Northern counties—in Durham and Northumberland, in the great manufacturing district, Yorkshire alone excepted, running through Cheshire, Derbyshire, Lancashire and Staffordshire. In these counties the chief increase was shown, the decrease having extended to all the most agricultural counties, Essex and Norfolk forming the only exceptions. In Wales there was an increase, the commitments in the Principality having for several years shown a tendency to increase.

On a comparison of the offences in which the decrease of the last year is most apparent, it will be seen that they are chiefly those which are prevalent in the rural districts, as burglary and housebreaking, sheep stealing, stealing fixtures and growing trees and plants, arson, maliciously maiming cattle, and offences against the game laws.

In the 1st Class—*The Offences against the Person*—there was a decrease of 38 per cent. last year on the commitments for murder, but when this offence is united with the attempts to murder and maim, the numbers are shown to remain stationary. In rape and assaults to ravish, there was an increase. On the whole class the numbers continue nearly the same, both on a comparison of the two last years, and the two last periods of five years.

In the 2nd Class—*The Violent Offences against Property*—there is a decrease of burglary, housebreaking, and the other crimes against the dwelling, and an increase of the robberies from the person. The class showing a decrease of nearly 3 per cent. on the two last years, and of 3·1 per cent. on the two last five years.

In the 3rd Class—*The Simple Offences against Property*—the chief decrease has fallen upon larceny, and is for that offence 6·4 per cent. There is also a decrease in horse and sheep stealing, stealing fixtures, &c. The chief increase arises in larcenies from the person, larcenies by servants, and embezzlement. The decrease on this class last year was 3·6 per cent., but an increase of 2·3 per cent. appears on a comparison of the two last five years.

The 4th Class—*The Malicious Offences against Property*—shows a considerable decrease, both in arson and maliciously maiming cattle, and a total decrease on the class last year of 19 per cent. On a comparison of the two last five years, however, an increase arises of 4 per cent.

In the 5th Class—*Forgery and Offences against the Currency*—the commitments remain nearly the same in the last year, but there is an increase of 8 per cent. on extending the comparison to the totals of the two last five years. The art itself has made great progress. We believe this to be the cause.

In the 6th Class—There is a decrease of nearly 15 per cent., arising chiefly on the offences against the game laws, and the indictments for keeping disorderly houses. In the two last five years the decrease has been 36 per cent., and is owing to the absence (with the exception of the year 1848) of seditious offences, and the great decrease of riots and breaches of the peace, by which such offences are attended.

There were only six persons executed last year, and all of them for atrocious murders. We can bear witness to some very felonious acquittals; some in which the evidence was so free from flaw or doubt, that the mob nearly performed the duty which the juries failed in. There is a curious table of executions during

the last half century, given by Mr. Redgrave, which results thus :

1801 to 1810	1811 to 1820	1821 to 1830	1831 to 1840	1841 to 1850
Executions 802	897	686	250	107

A very important feature in these tables, viz. the age of criminal offenders, is no longer given,—we believe owing to some reprehensible desire to effect a paltry economy in the Home Office staff of clerks. If this be so, it is quite unpardonable; for a very essential means of testing the progress of crime is now lost; and whether juvenile offenders are on the increase or not we are no longer enabled to know. The cause of public morals, and the science of mending them, should not be thus frustrated.

The great question respecting the causes of crime is best developed and aided by an analysis of its locality, and its relation to the various conditions of society which are supposed to affect its amount and intensity. Those most frequently advanced are education, class of industry, and density of population. The two former were very fully discussed, and their relation to crime elaborately pointed out, in the articles on the subject contained in this MAGAZINE in 1848.¹ The facts and deductions then produced have become standard authorities. They related, however, to the Criminal Statistics ending with 1847, and consequently the last three years afford fresh data. It may suffice to say generally that the conclusions thus established in 1848 are in substance borne out and equally applicable to the subsequent period. The great culminations of crime exist still in the Metropolitan district; and taking the same counties as representatives of each class of industry, they again stand thus :—

Above the average, 1. Metropolitan,	Below the average, 4. Agricultural,
2. Iron districts,	5. Silk.
3. Cotton districts;	6. Mining.

To assist rather than to express further conclusions, we have collated the following table of the population of 1851, and its relative density, the crimes classified into grave and minor² of the last three years, and the degree of instruction, as far as marriage register marks show it, in each county of England, and

¹ Since amplified and republished, with coloured diagrams, under the title of *Tactics for the Times*, published by Ollivier, Pall Mall.

² The “grave” offences consist of offences against the person, and offences against property committed with violence.

The “minor” offences are mainly offences against property *without* violence; and also all malicious offences against property, forgery, and all other offences tried at assizes and sessions.

in North and South Wales. This table will at least serve to show the distribution of crime.

As regards education, or even the possession of its rudiments, we beg to disclaim placing the slightest reliance on the marriage mark index. It is no index at all; and not only valueless as such, but, we fear, positively fallacious and misleading. We have only given it because we know that some eminent statistical inquirers, Mr. Fletcher and Mr. Farr among the number, think otherwise; and though they do not, we believe, regard it as a perfect test, yet think it affords a fair and reliable approximation to it. Our grounds for thinking otherwise are these:

It is notorious to all persons practically acquainted with the working of the registration, that numbers of persons when married, both males and females, will not, and do not, sign their names, though they can do so.

In the next place, the total number of persons married in any year, ex. gr. 1848, being 276,460 in England and Wales, forms but $1\frac{1}{2}$ per cent. of the population; and how is it possible that the instruction possessed by such a minute fraction can afford any reasonable ground for deducing from it the education of the remaining 98 $\frac{1}{2}$ per cent.? But it affords scarcely any test of the education of the $1\frac{1}{2}$ themselves; for is it not obvious, that the mere faculty of writing a name may, and often does, co-exist with extreme ignorance in nearly every element of education, properly so called? nevertheless, if it be worth anything, it must be as an indication of the possession of such elements of education. Is it advanced, that, though worth little in itself, it is fortified by other concurring tests, such as the predominance or the reverse of prosperity, pauperism, &c.? The short answer is, that no such concurrence exists as can afford any substantial or availing support to the marriage mark test. Nor can mere amount of property or independent means be safely taken to indicate the education of a district, or, therefore, to support any other indication of it. If this is not enough, a glance at the following table will, we trust, suffice to dispel any kind of reliance on a test which places the education of Devonshire far above the average, and superior to Middlesex, Surrey and Kent; whilst it ranks Herefordshire, the most criminal and perhaps the most Bæotian in the kingdom,¹ as little below the average, and superior to Yorkshire, Norfolk, Herts, Essex and Cambridgeshire!!

¹ See the speech of the Dean of Hereford (Mr. Dawes, late of Somborne) at the Diocesan Meeting at Hereford, on October 1st, 1851, wherein he stated it to be the worst educated county.

**CRIMINAL OFFENCES during 1848, 1849 and 1850, compared with
Population, &c.**

COUNTIES.	Population in 1851.	Persons to each 100 Acres.	CRIMINAL OFFENCES.			CRIMINAL OFFENCES in each 1,000 Persons.			Per Centage signing Register with Marks in 1848.
			Grave.	Minor.	Total.	Grave.	Minor.	Total.	
Beds.	129,789	43	85	442	527	65	3.40		52.6
Berks.	199,154	41	170	866	1,036	85	4.34		41.5
Bucks.	143,670	31	137	702	839	95	4.88		49.2
Camb.	191,856	35	129	726	855	67	3.78		44.7
Chesh.	423,438	65	408	2,423	2,831	90	5.72		44.5
Cornw.	356,662	42	152	623	775	42	1.74		42.2
Cumb.	195,487	20	63	372	435	32	1.90		23.3
Derby.	260,707	40	117	647	764	44	2.48		35.9
Devon.	572,207	34	277	2,347	2,624	48	4.10		31.7
Dorset.	177,597	29	96	707	803	64	3.98		36.9
Durh.	411,632	62	166	847	1,013	40	2.06		36.4
Essex.	343,916	34	298	1,609	1,907	86	4.67		47.1
Glouc.	419,475	53	360	2,665	3,025	85	6.35		33.2
Heref.	99,112	18	129	685	764	1.30	6.40		41.0
Herts.	173,963	43	144	837	981	82	4.81		50.6
Hunts.	60,320	25	40	247	287	66	4.09		45.0
Kent.	619,207	63	456	2,502	2,958	73	4.04		56.8
Lanc.	2,063,913	200	1,440	8,968	10,408	69	4.84		50.3
Leic.	234,938	45	112	833	945	47	3.54		38.6
Linc.	400,266	23	190	1,371	1,561	47	3.42		38.0
Midd ^x	1,895,710	1,059	1,629	10,820	12,449	85	5.70		33.0
Monm.	177,165	65	177	924	1,101	99	5.21		56.5
Norf.	433,803	33	252	1,775	2,027	68	4.09		44.3
Northam. ...	213,784	33	132	750	882	61	3.50		40.9
Northumb. ...	303,535	26	175	570	795	57	1.87		29.1
Notts.	294,438	55	121	909	1,030	41	3.08		40.2
Oxon.	170,286	37	105	746	851	61	4.38		36.1
Ratl.	24,272	25	23	91	114	94	3.74		29.8
Salop.	245,019	28	146	813	959	59	3.31		48.8
Somers.	456,237	43	397	2,130	2,527	87	4.66		36.9
South.	402,033	38	247	1,918	2,165	61	4.77		36.6
Stafford.	630,506	33	455	2,727	3,182	72	4.32		51.6
Suff.	335,991	37	194	1,310	1,504	57	3.89		46.1
Surrey.	684,805	144	524	2,911	3,435	76	4.25		37.8
Sussex.	389,428	37	201	1,327	1,528	59	3.90		33.1
Warw.	479,979	33	469	2,578	3,047	97	5.37		36.7
Westm.	58,380	12	20	154	174	34	2.63		17.2
Wilts.	241,003	28	169	1,134	1,303	70	4.70		45.1
Worc.	258,762	55	321	1,620	1,941	1.24	6.26		42.3
York.	1,788,767	49	1,053	4,920	5,973	58	2.75		42.0
Wales, N. ..	404,160	20	182	804	986	45	1.98		55.6
Wales, S. ..	607,496	22	267	1,450	1,717	43	2.38		55.2
Totals and Averages }	17,922,768	48	12,228	72,750	84,978	68	4.05	4.74	38.31

Mr. Fletcher, in his able pamphlet, falls into the common error of assuming that the amount of miscalled and abortive education now existing among the adult and marriageable population, has a tendency to check crime. That education,—such as it ought to be, and such as it will, we trust and believe, soon become,—will have that end, there can be no rational doubt. That it has not yet existed widely or long enough to do so we believe to be equally certain. Mr. Fletcher finds that the gross amount of crimes from 1842 to 1847, compared with the instruction in each county (as evidenced by marriage marks), results in a balance *against* the most instructed counties, which are in the aggregate, as we stated in 1848, the most criminal. This being opposed to his favourite hypothesis, Mr. Fletcher has resort to the following more ingenious than sound method of making the figures “declare decisively either in favour of, or against, popular instruction.” Now, bearing in mind that we ourselves maintain that efficient popular instruction is not in the least impugned by the state of crime, inasmuch as efficient instruction has no prevalent existence, let us see how Mr. Fletcher establishes his conclusions from the data before him :

“It has been endeavoured to apply one (a mode of analyzing and correcting the statistics of crime) for the *migration* of the dishonest into the more wealthy, populous, and instructed localities, by drawing a distinction between those classes of offences which arise from general depravity and those which will obviously be in excess in certain localities, because generally associated with the professional vice or vagabondage which seeks its home in them ; and, by proving statistically the existence of such a distinction, likewise the influence of the denser populations rather to *assemble* the demoralized than to *breed* an excess of demoralization.”

This distinction requires proof. It is by no means evident that the grave class of offences are not committed by vagrants, or that the minor ones, such as larceny, are more generally committed by them. Nevertheless, Mr. Fletcher proceeds to say that :—

“The great class of the more serious offences against the person, and malicious offences against property, is *obviously* that least affected by migrations of the depraved, and affords strong testimony, by *its universal excess wherever ignorance is in excess*, that many of the offences against *property* which are in such excess in the more instructed and populous localities, *are also committed by delinquents bred in the places indicated by the excess of the former offences.*”

We are not quite sure that we comprehend this aright, but we believe it to mean that a vagrant class, bred in the districts where the grave crimes abound, migrate from thence into the more instructed districts, where the *minor* crimes abound, which the said class therefore commit, rather than the native population of such districts. That people bred in districts prone to the graver crimes should, on migrating to other districts, instead of swelling the catalogue of such crimes, swell only the amount of minor crimes, requires support; and certainly derives none from the mere fact, that in the best instructed and most populous districts the minor, rather than the major, offences prevail. To argue thus would be *petitio principii* with a vengeance, and unworthy of Mr. Fletcher's high reputation as a statist; for it is evident that this state of crime may result from many different causes, all foreign to the one assigned. Mr. Fletcher however infers that:—

“It is this great class of offences, therefore, and not the gross commitments, which should be regarded as the *index crime* to the relative moral character of each district, not as a perfect test, but as one approximating to the truth much nearer than the latter, being affected in a smaller degree by the migration of the depraved towards the more instructed centres of resort; a further correction for which, in the case of the index crime itself, were it attainable, would render its universal testimony in favour of the good influences associated with instruction in England yet stronger.

This index class, of the more serious offences against the person, and the malicious offences against property, bears strong and universal testimony in favour of the influences associated with instruction throughout England and Wales.”

Unfortunately for Mr. Fletcher's theory it no longer does so. We have abstracted from the returns of the three last years above cited the following table, whereby it will be perceived that the same “index class” he relies on, for a test of criminality, now bears testimony the other way: the highest degrees of such instruction and *both* classes of crime predominate together!

RELATIVE INSTRUCTION (*according to Marriage Marks*) and
CRIMES, in *same Years as before cited*, of the *ten most instructed*
and the ten least instructed Counties and Welsh Districts.

Ten most instructed Counties.	Persons signing Marriage Registers with Marks.	Grave Crimes in every 1,000 Persons.	Minor Crimes in every 1,000 Persons.	Ten least instructed Counties.	Persons signing Marriage Registers with Marks.	Grave Crimes in every 1,000 Persons.	Minor Crimes in every 1,000 Persons.
Westmorel.	17.2	.34	2.63	Kent	56.8	.73	4.04
Cumberl...	23.3	.32	1.90	Monmouth	56.5	.99	5.21
Northumb.	29.1	.57	1.87	S. Wales..	55.2	.43	2.28
Rutland ..	29.8	.94	3.74	N. Wales..	55.0	.45	1.98
Sussex ...	31.1	.59	3.90	Bedford ..	52.6	.65	3.40
Devon ...	31.7	.48	4.10	Stafford ..	51.6	.72	4.32
Midd*	33.0	.85	5.70	Herts	50.6	.82	4.81
Glouc.....	35.2	.85	6.85	Lancash..	50.3	.69	4.34
Derby	35.9	.44	2.48	Bucks....	49.2	.95	4.88
Oxon	36.1	.61	4.38	Salop	48.8	.59	3.31
Total Averages }	32.0	0.70	4.65	Total Averages }	50.6	0.67	3.88

We have selected these twenty counties simply because they are in the two extremes as regards "instruction," omitting the medium counties as not declaring decisively either way.

The only safe conclusion from the premises is, that the marriage mark test, affecting about one and a half per cent. of the population, is not even a test of who can write their names, and still less of who are educated, or even moderately instructed; and that even if it were, it has no real relation to crimes whatever. It is, in fact, mere trifling to bestow any reliance upon it.

Density of population has, however, so general a coincidence with greater criminality, that some relation may be said to exist

between them. Thus we find the fifteen counties most prominent in these two features rank thus :

The most densely crowded.

*Middlesex,
*Lancashire,
*Surrey,
*Stafford,
*Warwick,
*Chester,
Kent,
Durham,
*Worcester,
Notts,
*Monmouth,
*York,
Leicester,
*Somerset,
*Herts.

The most criminal.

Hereford,
*Worcester,
Gloucester,
*Cheshire,
*Middlesex,
*Warwick,
*Monmouth,
Bucks,
*Herts,
Wilts,
Essex,
*Somerset,
*Lancashire,
*Surrey,
*Stafford.

Thus, ten out of the number, to which asterisks are prefixed, concur in being much above the average for criminality and density of population. This fact is important, and whatever may be its cause, it indicates the direction which our philanthropic efforts should take. The *cause* is indeed of far less importance than the *fact*. It is most gratifying to us to find so able, clear-sighted, and right-hearted a person as Miss Carpenter espousing the same views we put forth in 1848, as to the means required for this great end. Her admirable work on Reformatory Schools for the dangerous and perishing classes, is seasonably timed, and will not fail to direct the attention of all well-wishers to social progress, to this most vital subject.

It is proposed by a number of gentlemen, who have paid earnest and deep attention to the condition of the "perishing and dangerous classes of children," to hold a conference as early as may be practicable, with a view to make such united efforts as may lead to an improvement in the legislative enactments for these unfortunate beings. Among the gentlemen who give their invitation to this conference, are Sheriff Watson, M. D. Hill, Esq. Q. C., Jelinger Symons, Esq., and Joseph Hubback, Esq., Secretary of the Liverpool Industrial School. As we understand that Mr. Hubback has consented to act as Honorary Secretary, any gentleman desirous of attending the conference can communicate with him.

The object of the Conference is as follows:—

A consideration of the Condition and Treatment of the Perishing and Dangerous Classes of Children, and Juvenile Offenders, with a view to procuring such

legislative enactments as may produce a beneficial change on their actual condition and their prospects.

The children whose condition requires the notice of the Conference are,

First, *those who have not yet subjected themselves to the grasp of the law, but who, by reason of the vice, neglect, or extreme poverty of their parents, are inadmissible to the existing School establishments, and consequently must grow up without any education, almost inevitably forming part of the perishing and dangerous classes, and ultimately becoming criminal.*

Secondly, *those who are already subjecting themselves to police interference, by vagrancy, mendicancy, or petty infringement of the law.*

Thirdly, *those who are convicted of felony, or such misdemeanor as involves dishonesty.*

The provisions to be made for these three classes are,

For the first, *Free Day Schools.*

For the second, *Industrial Feeding Schools, with compulsory attendance.*

For the third, *Penal Reformatory Schools.*

The legislative enactments needed to bring such Schools into operation are, for the Free Day Schools, such extension of the present government grants from the Committee of Council on Education as may secure their maintenance in an effective condition; they being, by their nature, at present excluded from aid, yet requiring it in a far higher degree than those on whom it is conferred.

For the Industrial Feeding Schools, authority to magistrates to enforce attendance at such Schools on children of the second class and to require payment to the supporters of the School for each child from the parish in which the child resides, with a power to the parish officers to recover the outlay from the parent, except in case of inability.

For the Penal Reformatory Schools, authority to magistrates (or judges) to commit Juvenile Offenders to such Schools, instead of to prison, with power of detention to the governor during the appointed period, the charge of maintenance being enforced as above.

It is in this scheme assumed that society has a right to protect itself from injury and loss, such as it at present suffers from this class of children; that the existing system does not so deter or reform as to protect society; and that EDUCATION, including both instruction and training, is the only means of effecting any material diminution of juvenile crime.

Also, that in *all* the schools above named, the object in view is not so much to give a certain amount of secular knowledge, or to enforce a temporary restraint, as to train up useful and

self-supporting members of society, acting on a religious principle. Hence they will be best conducted *by individual bodies, carrying into effect their own religious convictions, with close and rigid inspection by the State* as to their effective working.

The parent has a double duty to discharge towards his child; first, to supply him with the means of subsistence; secondly, to train him in the way he should go. It is then further assumed, that, by neglecting the second part of his responsibility, he ought not to be permitted to escape the first.

The objections usually raised to such reformatory plans are, that they "confer a premium on crime," and "interfere with the liberty of the subject;" the religious question also presents obstacles. These difficulties are all met in the preceding scheme and the principles assumed.

ART. VII.—LANDLORD AND TENANT UNDER THE PRESENT CRISIS.

IN these momentous and progressive times, when science is making such rapid strides in agricultural improvements, it is absolutely incumbent on us, whether we possess broad acres or narrow garden strips, to co-operate in carrying out more liberal covenants either under private arrangements or public enactments, and more enlightened views respecting land culture, as it is only by an assiduous attention to this subject we can hope successfully to compete with the foreigner. Thus, agriculture, although temporarily depressed by low prices and excessive burdens, (for the burdens of land bear an unfair proportion compared with personal property and stock in trade, so much so that in the eventful session of 1846 Sir Robert Peel said, "The land is entitled to protection on account of some peculiar burdens upon it, but that is a question of justice rather than of policy; but I have always felt and maintained that the land is subject to peculiar burdens,") and aided by security for improvements in the shape of an acknowledged "tenant right," may again take its stand amongst the other arts and sciences, increasing the energies of the tenant, unshackled by the caprice of landlords, and, by employing the labourer, stopping crime and degradation, and, by increasing produce, serving the best interests of the community at large.

Although properly constructed leases and agreements vary

according to the prevailing customs and modes of tenure in the several districts or counties, yet they ought to be clear, distinct and simple, and it becomes the duty of the landlord to let the tenant have such an equitable interest in the culture of the soil, so as to invest the capital employed beneficially for himself, and improve the landlord's interest. Two modes of letting land now principally prevail, viz. a holding for one year, extinguishable at the end of the year by a six months' notice being given by either party; and by a lease for a certain number of years mentioned in the agreement. The relative superiority of holding by lease or by a yearly tenancy has been much disputed; but we believe it is a fact that cannot be denied, that where leases for years are the prevailing mode of letting, there the best rents are paid, the land better cultivated, and the farmer reaps the most profit. A written agreement to enter into a lease when required has been held at law as good as a lease, and is generally a precursor to a lease.

The word "rent" implies the return in service, corn, cattle or money for the land demised. There are three kinds of rents: rent-service, partly in corporal service and partly in money; rent-charge, where lands are made over to another for a certain term, with a sum of money reserved as a yearly payment, and a clause of distress for non-payment charged on the land; and rent-seck, or dry rent, which has no clause of distress. The adoption of a corn rent in place of a fixed money rent takes away the only element of uncertainty which need cause any doubt to the tenant, and, owing to Free Trade principles, is likely to become more general than formerly, as it is impossible, supposing a farm to be well cultivated, that the tenant can pay the same rent when wheat is 40s. as at the time it was 60s.; and the usual way is to take the average prices of wheat and barley for three years, and for the tenant to pay a proportionate rent to the price, and as the rent would be measured, not by the average of one year, but three years, the tenant would never have to pay a large increase of rent in one year, as the presumption is, in the course of three years there would be both abundant and deficient harvests.

With regard to Ireland, we are told that a new and remarkable law is necessary; that the contract between the possessor of the land and him who desires to have it for the purposes of tillage requires to be taken out of the common order of contracts; and that a supervising power to regulate the terms of the bargain between the two parties must be appointed by the state.

Admitting that there are cases which justified legislative interference with the free-will of contracting parties, two assertions demand remark. The Irish tenants are miserable, and demand

legislative interference. The second assertion is, "that, with certain and few exceptions, the British Isles are the only parts of the world in which the class of occupiers have to adjust their relations to the soil by special bargain, in the same way as people buy hats and coats. Every one else but the farmer is his own landlord, or else the hand of the landlord over him is strictly restrained by law. It is only in these islands that law leaves the landlord unfettered by positive obligations, and at full liberty to use or abuse as he pleases the dominion given him over the soil."

The Irish Tenant league proposes to step in between the parties to the contract, namely, the possessor of the land and the man who proposes to hire it, and deprive both of the real control of the arrangement. Seasons, they say, are precarious, and the produce uncertain, the outlay is necessary and certain; and they therefore propose not to leave to the discretion of B., the tenant, the determination of the sum he can afford to pay, but to settle the amount when the crop is gathered, by taking an account of the actual outlay and the actual return, and thereupon giving to the landlord a fair proportion of the net produce of the farm, as determined by arbitrators.

Such a measure would be fatal to the interests of the country, and is very unlike the Landlord and Tenant Bill, which has for its object the power of securing a judicious and useful amount of outlay for improvements, and not the regulation of the absolute value of the land itself.

In La Béarn (the granary of France), as well as in most parts of France, say the correspondents of the Morning Chronicle, leases are ordinarily drawn up for periods of nine, eighteen or twenty-seven years, and there are fixed breaks, by which either party can get rid of the obligations; ordinary stipulations in French leases bind the farmer to pay the taxes falling on the land, to take on himself the charges of the necessary repairs, so as to keep the farm buildings in proper order, not to sublet without the consent of the proprietor, and to consume all the straw on the farm. In some parts of the country a curious sort of tenant right prevails: at the expiration of the lease a farmer may bargain to renew it again at a higher rate than before: if the landlord refuses, he is bound to pay the tenant down in ready money three times the amount of the proposed yearly increase; thus, suppose A. rents a farm at 80 francs the hectare (not an uncommon rate), and offers at the expiration of his lease to renew the obligation at the rate of 85 francs, the landlord, if he refuses, is bound to pay him down 15 francs per hectare as an assurance for the improvements.

which he has made and the capital he has expended; in this manner the tenant has a hold upon the proprietor, who must pay if he wishes to eject, while, on the other hand, there is little danger of the farmer exaggerating the value of the improvements, as he may be taken at his word, and may be made to pay the increased rent rateably to the increased productiveness and value of the land.

In Denmark, the tenant is entitled to a renewal of the contract for fifty years, on paying to the proprietor an increased yearly rent. If such an offer is made in the first ten years, the proprietor shall either accept it, or buy out the tenant by paying twenty times the amount of yearly increase offered, e. g., if the tenant offers to pay in rents five quarters of barley more than before, the proprietor, in case he does not accept the offer, shall give the tenant an indemnity of one hundred quarters of barley. If the tenant makes an offer in the course of the next ten years, and it is not accepted, then the proprietor shall pay to the tenant an indemnity of sixteen times the amount of the offered yearly increase. If the offer be made within the third term of ten years and refused, then the indemnity is to be fourteen times the amount of the offered yearly increase; if in the fourth ten years, twelve times such amount. If after forty or forty-five years, the indemnity is to be ten times the amount; and if the forty-fifth, forty-sixth, forty-seventh or forty-eighth years, five times the amount. In the last year the proprietor shall neither be bound to renew the contract nor to give him indemnity for not renewing it; the farmer is precluded from transferring the property leased or any part of it to others without the proprietor's consent, but he has the option of giving up the lease. In this case it is to be disposed of by public auction, and the proprietor is entitled to reserve the ground on paying the highest bid offered at the auction within a term of fourteen days.

The burdens which attach to lands are tithes, partly extinguished by allotments of land in lieu of tithes and commutations, church rates, repairs of roads and turnpike tolls, poor rates (out of which county rates are paid), land tax and income tax.¹ Twelve millions of direct taxation in the shape of poor rates, county rates, highway rates, church rates, tithes, land and income tax, are annually levied on the real property of the country, while property other than real is almost totally exempt. By the act of Elizabeth, lands, houses, tithes, coal mines and underwood within the parish are rateable, whilst personal property, stock in trade, ships, &c., to be rateable must be locally

¹ These amount to about 25 per cent., or 40s. per quarter on the wheat produced.

situate and visible within the parish in which the owner resides. It must not only be productive, but must be capable of being proved to be productive, and the rate applied to the clear liquidated surplus, after payment of the owner's debts, which is considered to constitute his ability. The determination then of the rateable value of stock in trade is the chief subject of difficulty, so much so, that in manufacturing and mining districts, real property is often only made applicable owing to the trouble and expense of the assessment.

It appears that out of a population of 27,000,000 in Great Britain and Ireland, of which nearly 18,000,000 are engaged in or dependent on agriculture, the taxation, direct and local, paid by land amounts yearly to the sum of 17,000,000*l.*, of which 6,000,000*l.* is paid by the agricultural classes. The capital and stock invested in land is of the value of 200,000,000*l.*, and the annual produce is 250,000,000*l.* Farmers, landowners, and others interested in land, thus naturally complain of the immense amount of taxation and want of protection, when in Coventry the ribbon manufacturers are protected by a duty of 14*s.* a pound, in Derby the silk trimmers fifteen per cent., and in Stafford the shoemakers at 1*s.* 9*d.* or 14*s.* a dozen. The editor of the "Times," in a leading article of the 20th of last February, says, "It is a matter of common sense, justice and honesty, that if one occupier of property is rated to the relief of the poor, or any other local burden, all occupiers should be rated, without any exemption. If exemptions are once allowed, there is no end to them; a large proportion of those who ought to pay get off one way or the other, those who continue to pay are the more burdened; instead of the exemptions being a real relief to the occupiers, the landlord gets so much the more in the shape of rent." The agricultural classes, therefore, think and feel that, as they are now deprived of protection, under which they have derived their property and pursued their industry, their position should be altered by an adjustment of rent, or an alleviation of this intolerable burden, and adapted to this new state of circumstances, and the system of taxation revised, with reference to a more equal and just distribution. If as much as six millions of property have been sacrificed under the system of free trade, and many speculators utterly ruined by importing foreign corn and pre-engaging foreign crops for the market in the face of a good harvest expected or ascertained, it is useful to take warning by acting more discreetly for the future; for as long as corn from Dantzic and other ports can be imported at 33*s.*, including freight, insurance, commission, &c., the foreigner can profitably

undersell us, although a great decrease in the importation of corn has taken place in 1850 compared with 1849.

			Duty.
Malt Tax	..	£5,225,072	.. 21s. 8d. a qr.
Hops	..	392,381	.. 18s. 8d. per cwt.
Tea	..	5,829,992	.. 2s. 2½d. per lb.
worth from 6d. to 3s. 6d. per pound, which shows the poor pay seven times more tax on the common tea than the rich pay on the fine tea.			
Coffee	..	£709,632	.. 4d. per pound.
Soap	..	991,523	.. 1½d. 4⁄p lb. & 5 4⁄p cent.
Candles & Tallow	..	99,330	.. 1s. 6d. 4⁄p cwt. on tallow

All these taxes press most intolerably on the poorer classes, and ought to be repealed as soon as the exigencies of the state will allow; and, as the Chancellor of the Exchequer said last year, following the path of the late Mr. Huskisson, "It is the duty of all Chancellors of the Exchequer to take off the burdens from the shoulders of the poor and put them on the rich, as more capable of bearing them;" and when we find measures for charging the rates of small tenements on the owners instead of the occupiers, and for the revival of the laws of settlement and removal, altering of the burdens of highways &c., and for rating to unions instead of parishes as a means of promoting and extending relief to the poor, and as all the promises and prophecies regarding free trade have failed, for Sir Robert Peel said in 1842, "I cannot guarantee you by legislation any particular price, but I say that as long as wheat is under 50s a quarter you shall not be exposed to the importation of foreign corn," we should be careful that we do not increase the burdens of land instead of diminishing them; for, depend upon it, the moment the landlord finds himself unable to meet foreign competition, owing to the low price of wheat, he will shift them on to the tenant by demanding an equivalent in the shape of rent, and the tenant will drive the labourer to the wall and pinch him by a reduction of wages.

The Tithe Commissioners' Report has just been published, in which they state, that at the expiration of the present commission it will be beneficial if certain powers connected with tithe rent charges should exist, of which some should be permanent and some temporary. Those which it is suggested should be permanent should relate,

1stly. To the custody of documents, maps, &c., as also a power to furnish attested copies of them.

- 2ndly. To re-apportionments in the division of estates, and in the separation of gross rent-charges into distinct parts, where the interest becomes divided amongst several parties.
- 3rdly. As to hops and market gardens.
- 4thly. To the redemption of small rent-charges.
- 5thly. To the selling and defining glebe and other ecclesiastical lands and rent-charges.
- 6thly. To authorize mergers where interests now separate come into the same hands.

The powers required only for a time will relate to the sale of tithes, farms, and buildings; the taxation of valuer's bills, and giving authority to collect them; the confirmation of apportionments outstanding at the extinction of the commission; the completion of cases now pending in the superior courts; and the application of the provisions as to old and imperfect agreements for giving land for tithes in the case of a few inclosure awards, of which the arrangements have not been legally completed.

Upon the Tithe Commutation Act, Mr. Jervis, of Suffolk, says, the difference in value of farm produce at the present moment is very great to what it was when the tithe commutation rent was based; and allowing for the diminished cost of bones and seeding, the land is lessened in value per acre of the farm produce of a farm producing four quarters of wheat, six quarters of barley, eight quarters of oats, and four quarters of beans and peas, 27*s.* 3*d.* per annum, and therefore he contends, that, unless rent be adjusted and the tithe commutation altered, the land is not worth cultivating under the present ruinous prices.

From the summary of the revenue, it appears that, despite the alterations of the tariff, the resources of the government and of the public creditor are as stable as ever; pauperism has decreased, notwithstanding wages in many of our agricultural districts have decreased also. Bread is cheap; so also are the necessaries of life; and it had need be, when we find the parish allowance, even in opulent places, for an unemployed man, his wife and children, if willing to stay out of the union, which most of them prefer, is 3*s.* 6*d.* per week, viz., 2*s.* 6*d.* for the man, 1*s.* for the woman, and nothing for the children who are too young and unable to work, whether the number of such children be two, four, or six.

The principle of the new County Rating Bill is, that before any sum shall in future be assessed to the inhabitants of coun-

ties in England and Wales, its necessity and propriety must be sanctioned by the majority of a mixed body, consisting of one-half magistrates, and the other half of those whom the rate-payers shall annually choose to act on their behalf.

Mr. Cheetham, who has paid much attention to the subject, on opening the following question for discussion, How far taxation enters into the cost of agricultural produce, said, at the Farmers' Club, at the beginning of the year, "taxation is so wide indeed that it embraces within its range all local as well as fiscal imposts; and I now propose to show the manner in which taxation enters into the cost of agricultural produce, and to do this effectually, I will give you an estimate of the cost of cultivating an acre of land, dividing the expenses into two elements, as follows:—

	Cost per acre.			Taxation per aeq.		
	£	s.	d.	£	s.	d.
"Great tithes	0	5	0	0	0	0
Small tithes, 1s. 6d.	0	0	0	0	0	0
Poor, county, highway and church rates, 4s. 9d.	0	6	9	0	0	2
Labourers' wages	1	5	0	0	8	4
Tradesmen's bills, artificial manure, or food	0	4	0	0	1	4
Maintenance of three horses on every 100 } acres, at 9s. each per week	0	18	9	0	6	3
Maintenance of farmer's family and general } superintendence	0	13	0	0	4	4
Seed corn	0	9	0	0	3	0
Casualties of cattle	0	1	0	0	0	4
Interest of capital at 7l. per cent.	0	7	0	0	0	0
Rent	1	0	0	0	0	0
	<hr/> £5 9 0			<hr/> 1 5 8		

"Thus the expense of cultivating an acre of land amounts to 5l. 9s., whilst the rent-charges, tithes, poor rates, &c. being 1l. 3d. per acre, and the direct and indirect taxation 25s. 8d. per acre, the combined amount is 36s. 11d. per acre, or 33 per cent. for the total cost.

Mr. Baker says—

The poor-rate	4s. per acre.
The highway rate	9d. per acre.
The church rate	3d. per acre.
Land tax	10½d. per acre, or 10½d. in the pound.
Landlord's property tax	9d. in the pound.
Tax on labour	10 per cent., or 4s. 6d. for each acre.
Malt tax	1s. per acre.

"It is quite clear, then, that land bears an unfair and unequal amount of taxation compared with stock in trade, which we have seen must be visible and tangible, in order to be taxed."

Mr. Cheetham furnished the following paper.

"At a recent agricultural meeting a printed paper was circulated, recommending a fixed scale of wages, or be regulated by the six weeks' average price of wheat in each preceding month, as follows:—

Wheat.			A first-class labourer.
under 30s.	..	..	7s. 0d.
30s. to 40s.	..	..	8s. 0d.
40s. to 50s.	..	..	9s. 0d.
50s. to 60s.	..	..	10s. 6d.
60s. to 70s.	..	..	12s. 6d.
70s. to 80s.	..	..	14s. 6d.
80s. to 100s.	..	..	16s. 0d.
100s. to 110s.	..	..	17s. 6d.

"Differing widely from the writer's views on this important question, we subjoin some calculations, assuming the following elements of the question as our fixed data:—

"1. That every fall in the price of wheat of 5s. a quarter admits of the price of the quartern loaf being lowered one halfpenny.

"2. That when the price of wheat is 48s. per quarter, the price of the loaf should be 5½d.

"3. That a labourer with a family of five persons, each consumes one and a half loaves, or seven and a half loaves weekly.

"4. That the natural value of silver, the wages of labour, and the price of wheat, are based on silver at 5s. 2d. the ounce, wheat 4s. a bushel, or 32s. a quarter, and labour 1s. a day, or 6s. a week.

"5. That taxation in this country, adding 33 per cent. to the necessaries of life, the cost of the subsistence of the labourer is enhanced from 6s. a week to 9s., and the required wages of labour will be 9s. instead of 6s. with natural prices.

"6. That the productive cost of wheat is at all times the basis of the element of the wages of labour—that is, the cost of the subsistence of the labourer.

"7. Thus the natural cost of wheat being assumed at 32s. per quarter, and wages at 1s. a day or 6s. a week, each day's labour is the equivalent of 5s. 4d., or one-sixth of the unit of 32s. a quarter for wheat, and the quartern loaf at 3½d.

"8. We then assume the following to be the expenditure of such 6s. wages:—

Bread, 7½ loaves at 3½d.	2s. 2½d.	Fuel ..	0s. 6½d.
Grocery	1s. 0d.	Meat ..	0s. 9d.
Rent	1s. 0d.	Clothes ..	0s. 6d.
Total, 6s. or 72d.			

"9. That if indirect taxation to the extent of 33 per cent. is added to the natural cost of wheat, such tax requires an increase of wages 50 per cent., or from 6s. to 9s. a week, add 33 per cent. to the cost of wheat, say from 32s. to 48s. per quarter, which latter price is the

equivalent of wages at 9s. a week, and the following is the assumed expenditure of such wages:—

Bread, 7½ loaves at 5½d.	3s. 4½d.	—Taxation 33 per cent.	1s. 1½d.
Grocery ..	1 6	"	0 6
Cottage rent ..	1 6	"	0 6
Meat ..	1 0	"	0 4
Clothes ..	0 9	"	0 3
Fuel, &c. ..	0 10½	"	0 3½
	9 0		3 0

We thus see that the expenditure in bread is 40½d., or 37 per cent., and in other necessities of subsistence 67½d., or 63 per cent., and taxation 33 per cent. or 3s. a week.

" 10. The elements of the cost of the 4lb. taxed loaf at 5½d. are as follows:

Natural value received by farmers and land-owners for wheat, ..	2½d.
Millers' and bakers' charges (15s. per quarter) ..	1½
Government taxation 33 per cent., including tithes and poor rates ..	1½½
Total ..	5½

" 11. It is thus evident from the above analysis, that if agricultural or other wages fall to 6s. a week instead of 9s., all taxes on their subsistence will fall on the labourers themselves, and not on their employers,—and taxation will become a grievous tyranny to the working classes, and the national debt an incubus not to be borne.

" 12. We now arrive at that point of the question of the wages of labour being based on the fluctuating price of wheat and bread, with the existing rate of wages at 9s. a week, and wheat 48s. per quarter, and in the first instance we take the *descending* scale.

" 13. If wheat falls in price 5s. 4d. per quarter, or from 48s. to 42s. 8d., the labourer will only save 3½d. per week, or one halfpenny in each loaf, and the required subsistence wages would then be 8s. 8½d.; if it falls to 37s. 4d.—8s. 4½d.; if 32s.—8s. 1½d. per week, instead of 6s. a week, when the cost was 32s., or its natural price, irrespective of taxation.

" 14. We next proceed with the *ascending* scale. If wheat rises 5s. 4d. per quarter, or from 48s. to 53s. 4d., wages should be 9s. 3½d. per week; if to 59s. 8d.—9s. 7½d.; if to 64s.—9s. 10½d.; if to 69s. 4d.—10s. 3d.; if to 74s. 8d.—10s. 6½d. per week.

" 15. We again repeat, that we base such calculations, as to the required rate of wages, from the fact that the expenditure of the 9s. a week consists in this—that bread costs only 37 per cent., and other articles 63 per cent. of such general expenditure.

" 16. Such we consider to be the equitable claims of the labourer for wages; but the question of the ability of the farmer to pay the *descending* scale of wages, when the price of wheat falls below 48s. per quarter, is altogether a different affair; for assuming the present

productive taxation cost of wheat to be 48s., and a farmer sells 100 quarters of wheat (the product of twenty-five acres of land), and he obtains 240*l.*, that is, 160*l.* of natural value and 80*l.* of taxation price; or if at 42*s.* 8*d.*—213*l.* 6*s.* 10*d.*; if at 37*s.* 4*d.*—168*l.* 13*s.*; if 32*s.*—160*l.*: and the important question then arises, how far will it be possible for the farmer to pay the required subsistence rate of wages of 8*s.* 1½*d.*, with a receipt of 160*l.* instead of 240*l.*; or the 80*l.* of taxation embodied in the productive cost of such 100 quarters of wheat."

With the view, then, of relieving land, as wheat has not maintained so high a price as the Chancellor of the Exchequer expected, and to encourage the employment of capital, an act has been passed to remit the duty on bricks and to reduce the stamps on the transfer of small estates, bonds, mortgages and leases, which reduction amounts—

In stamp duty to	£300,000
In the reduction of the duty on bricks	450,000
Total.....	£750,000

He thereby proposes to make the stamp duty on conveyances and transfers of property an uniform 1 per cent. or 20*s.* ad valorem; on mortgages and bonds an uniform one-eighth, or 2*s.* 6*d.* per cent., which would be a relief on all sums up to 10,000*l.* He then proposed that leases should remain as in the original proposition, except certain Irish leases, and that all contingent settlements of lands should be free of duty:—

ORIGINAL PROPOSITION AS TO LEASES.

Present Duty.	£	s.	d.	Proposed Duty.	£	s.	d.
Rent 20 <i>l.</i>	1	0	0	Rent 25 <i>l.</i>	0	2	0
Rent 100 <i>l.</i>	1	10	0	Rent 50 <i>l.</i> ..	0	5	0
Rent 200 <i>l.</i>	2	0	0	Rent 75 <i>l.</i>	0	7	6
				Rent 100 <i>l.</i>	0	10	0

The new stamp duties act, 13 & 14 Vict. c. 97, repeals stamp duties on leases for a year.

On an agreement of 1080 words a stamp duty of 2*s.* 6*d.* and, above that amount, a further progressive duty is enforced.

On bonds a duty of 1*s.* 3*d.*, where the sum does not exceed 50*l.*, and so on to 7*s.* 6*d.* for 300*l.*, and for every additional 100*l.* the sum of 2*s.* 6*d.*

On conveyances the ad valorem duty is to be levied from 2*s.* 6*d.* for 25*l.*, and so on to 3*l.* for 600*l.*; and where the purchase shall exceed 600*l.*, then for every additional 100*l.* a further sum of 10*s.*

On leases or mortgages the duties are declared, and on settlements as in the schedules to the act.

With respect to warrants of attorney, the duty is the same as on bonds ; on warrants of attorney not charged in the schedule, a duty of 1*l.* 15*s.*

The stamps on memorials he also proposed to reduce from 10*s.* to an uniform 2*s.* 6*d.* duty, and that the progressive duty on all sums after the first should be an uniform 10*s.*

If then, as the late Sir Robert Peel told us, we must abandon protection for ever, farming must be freed from the impediments which at present hinder us from successfully struggling with foreign competition ; farmers must learn the most improved methods of corn growing and cattle feeding in increased quantity, improved quality, and at a diminished cost. Let them turn their attention towards modern science as a means of increasing natural productiveness and maintaining an increasing population. If Sir Humphry Davy did much, Liebig, Playfair, Johnstone and others, have done more in supplying the absent constituents of soils and ingredients of plants necessary for productive vegetation. Rents, if too high, must be adjusted, and a mutual co-operation between landlord and tenant engendered, so that the tenant may with security embark his capital, skill and labour in the cultivation of the soil. Produce and grain rents are every day becoming more general, with less stringent covenants in leases or agreements ; commissioners have been sent into the worst-farmed counties to report on tillage and the capabilities of land, and the average crops, the breeding and fattening of stock, the rearing of dairy produce, and the condition, habits and wages of the labourers ; and as a new era has arrived, and agricultural resources, through chemical agency, more developed, so new blood has been infused amongst occupiers, and on abandoning protection, it is only by application of skill, capital and labour, and by a compensation for unexhausted improvements, they can hope to compete with the foreigner. It appears that the principal agricultural counties through which the commissioners have gone and made their reports, are Buckinghamshire, Berkshire, Oxfordshire, Gloucestershire, Wiltshire, Dorsetshire, Devonshire, Cornwall, Sussex and Kent. The farming, taken on the whole, appears to have been better than they expected ; and the average crops, say for wheat, from twenty to thirty bushels, and barley thirty to forty bushels an acre. In Cornwall the produce is less, in Kent more. The rotations followed of course vary with the quality of the soil, the best parts being managed under the alternate system of four-course corn and cattle crops. The in-

ferior parts in a five, six or seven years' course, as appears most advisable to the farmers—say, then, as a general rule on fair land—1st, turnips; 2nd, barley; 3rd, clover; 4th, wheat; 5th, oats; 6th or 7th, saintfoin. In seven years, then, the land gives three corn crops and four green or cattle crops. The five-years' course is simply an extension of the four course, by permitting the seeds to continue two years before being ploughed in; and the six or seven embraces the same crops as the preceding, with the addition of a crop of oats after the wheat.

In Oxfordshire the management of the sheep seems very superior to any other county, and, although out of doors, seems to pay better than Mr. Huxtable's new-fangled doctrine of cooked food and box feeding; the whole of the south-western and western districts are badly supplied with farm buildings, hovels for cattle, &c., and compensation for unexhausted improvements is little known, the adjustment of rent and security of tenures little understood, and very little improvement has taken place compared with the more favoured counties of Yorkshire, Lancashire, Bedfordshire, Norfolk and Essex.

On this power of leasing, Mr. Calvert, in his second letter to the Chancellor of the Exchequer, says,—“I recur to the subject of the power of leasing at rack-rent, that I may suggest the propriety of conferring a further power on the tenant for life. The disadvantages of a common lease is, that it is in practice a one-sided agreement, unless ample securities are taken for the payment of rent. It binds the landlord, but not the tenant, because the land is sure to remain in statu quo; but if the tenant, from any cause whatever, ceases to pay his rent, it is rarely worth the landlord's while to support his different claims by litigation. The course most advantageous to him is to put an end to the lease; but if the tenant were, during the first year of the tenancy, to lay out capital in improving the premises, the outlay would be a motive to him for fulfilling all his obligations, and continuing tenant during the entire term. The lease would then be a contract, of which the complete performance would equally be for the interest of both parties; I therefore propose that a tenant for life should have power to make a lease for twenty-one years, at an uniform rent, the tenant consenting to lay out a certain sum in improvements, with the landlord's approbation, during the first three years of the term. The security of the remainder-man is the only point to be considered. I would allow him to set aside the lease, if he could show that the tenant for life had received any fine, or consideration in the nature of a fine, for the lease, or if he could show that the lease was in anywise fraudulent to himself. The evidence upon such a question would

be easily obtained; but I would further add that there ought to be a power in the first instance of placing the lease beyond dispute, by referring it to the Inclosure Commissioners, or to some authority named by them."

Mr. Davis, in his Land Steward, says,—“A power to compensate a tenant for improvements effected on estates should be given where the landlord has not the power to grant leases, or where his interest is so limited that he should not be required to grant them.” In this case power should be given to the tenant to effect such improvements, either by building or otherwise; and should he at any time quit his holdings, he should have a claim on the incoming tenant, or against the estate.

The power to charge the estate with compensation to a tenant for improvements, or to devolve such a charge upon the next owner, is one of the highest order, which no owner of less than a fee-simple can exercise; whilst the power to grant leases, even of twenty-one years, is commonly possessed by life-owners. The alternative therefore suggested by Mr. Davis broaches unconsciously the grand besetting difficulty of the compensation clause,—a far greater than exists in the general extension of the power of leasing, and the conferring of which on life-owners, (viz.) a general power to charge future interests, would amount to a virtual abrogation of settlements, and of the law of entail altogether. As to a running charge on the land, or the next occupant of the farm, by an outgoing tenant (between whom and a new comer no possible contract of any amount can exist or be raised in law), the proposal, easy-sounding as it is, treads upon a hot bed of difficulties far worse and more impracticable than it seeks to cure.

Writers upon agriculture have scarcely as yet a conception of the enormous under-current and conflict between our whole system of real property law with the present demands of our advancing agriculture; but current events are making them feel their way to the subject.

Mr. Mechi said, at his Tiptree gathering last year,—“Agricultural improvement is no joke; it can only be carried on by the general and hearty co-operation of landlords and tenants. I feel it as an utter disgrace to all England that, while we can envelope the world in calico,—while by steam and other appliances of our manufactories we have an abundance of cloth for our people, and plenty to exchange for luxuries of other countries,—it is a disgrace, I say, that we do not produce our own quarter loaves in superabundance. I maintain that if every poor person in this kingdom had the same amount of capital and labour employed on it that they have, you would be obliged to

exchange bread and beef for port wine, champagne and everything of luxuries; and I say, taking the acreage and average of this kingdom, which are well understood,—taking the acreage and produce of this farm, which are well ascertained,—I repeat that if the boundaries of England produced the average of this farm, as they might do, by throwing down these broad and cumbrous fences, such as we lately saw in the county of Devon, and carrying on other works of improvement, you would be in a condition to supply the world, and to bring back luxuries in exchange.”

Mr. Mechi’s present crop on 170 acres of land is as follows, said a writer in the “New Monthly Magazine” last year:—

78 acres of Wheat	25 acres of Clover
6½ .. Peas	6½ .. Potatoes
6½ .. Beans	15 .. Rye Grass and Pas- ture
11 .. Mangel Wurzel	
10 .. Swedes	

Gardens, Plantations, Roads and Buildings, &c.

It is therefore no wonder he should husband his resources as much as possible, by not feeding on his land, when it appears natural pasture is scarce and not easily obtained.

January, 1850.

The actual cost of producing thirty-two bushels of wheat on an acre of fair average land in Norfolk, by Mr. Franklyn.

	£	s.	d.
Rent, tithe, poor, highway and church rates	1	10	0
Seed at 2½ bushels, ploughing, harrowing, drilling and rolling at per acre	0	15	0
Weeding and hoeing	0	5	0
Ten loads of manure at 4s. per load	2	0	0
Filling, carrying, spreading	0	13	4
Bird-keeping	0	1	6
Harvesting	0	13	0
Taking in rick, thrashing, and carrying out	0	12	0
Tradesmen’s bills	0	5	0
Interest on capital 10s. per acre at £5 per cent	0	10	0
	7	14	10
Produce of thirty-two bushels at 5s. a bushel	8	0	0
Balance per acre in favour of farmer	0	5	2

Estimate of cost of an acre of roots.

Rent, tithe and taxes	2	0	0
Interest on capital, 15s. per acre	0	15	0
Ploughing and husbandry in autumn	1	5	0
Cultivation in spring	0	2	6

	£	s	d.
Double harrowing and rolling	0	4	0
Twenty loads of manure and filling	4	0	0
Ridging	0	2	0
Women spreading dung in furrows	0	1	3
Splitting the ridges over manure	0	2	0
Drilling and seed	0	4	6
Singling	0	3	6
Twice horse hoeing (Garrett's)	0	1	6
Hand-hoeing in the rows	0	3	6
Pulling, topping and storing in clumps.....	0	7	6
Four bushels of superphosphate of lime drilled with the seed	0	16	6

£10 8 3

Produce 20 tons. Land dug 10 inches deep at 4d. per rod, amounting to about 30s. an acre, and a good substitute for subsoiling.

At the Protection Banquet held at Edinburgh, April, 1851, Mr. Sheriff Alison said: In the five years ending with 1835, the annual importation of wheat under protection was 398,000 quarters a year. This of course was comparatively trifling, and was not a hundredth part of the consumption of Great Britain, which was then to all intents and purposes a self-supporting country, and for several years previous to that period not a single quarter was imported; a change of policy was introduced in 1842, and the duties materially lowered, the result was that from 1842 to 1845 the average importation was about two millions and a half. Since the corn laws were repealed in 1846, the average of the importation has been for the last two years 10,796,000 quarters; and in the month of February, 1850, the importation of all kinds of grain was 342,000 quarters. In February, 1851, it was 694,000 quarters. Again in March, 1851, when the prices were 39s. a quarter for wheat, the importation was 928,000 quarters, being double what it was the year before. Thus we were importing at the rate of 11,000,000 of quarters a year, which was fully one-fourth of the annual subsistence, one-third of all the wheaten bread eaten by Englishmen. Cattle was on the same ratio; and whilst our importations generally are increasing, our exportations are far from increasing.

With respect then to the importation of corn, the Chancellor of the Exchequer admitted that he had been 120 per cent. wrong in his calculations in 1829, and seventy per cent. wrong as regards last year.

Earl Fitzwilliam's scale of reduction is twelve per cent. per annum; the basis upon which his previous rents were fixed was 6s. 8d. per bushel for wheat, but the basis on which the readjustment has been calculated is 5s. 10d. per bushel.

Mr. Baker, of Essex, stated at the Farmers' Club, in May last, the average amount of rental in this country in 1793, of the enclosed arable land, was 14*s.* 8*d.* per acre, and of meadow land 25*s.* per acre. The presumed rental, as paid at the present time, may be assumed at about one-third more; viz., arable land, 22*s.* 6*d.*, and meadow land 32*s.* 6*d.*, which pretty nearly accords with the increased quantities produced; but the incidental expenses are much higher now than at that period:

Average 1793.

Bushel.	Bushel.	Bushel.	Bushel.
Wheat.. 22½ <i>s.</i>	Barley.. 34½ <i>s.</i>	Oats.. 33 <i>s.</i>	Beans and Peas.. 20½ <i>s.</i>

1850.

Wheat.. 30 <i>s.</i>	Barley.. 44 <i>s.</i>	Oats.. 52 <i>s.</i>	Peas and Beans.. 30 <i>s.</i>
		Clover.. 1½ tons.	

and the following resolutions were carried at the Club:—

“That as regards the investment of capital in the purchase of land, the simplification of titles, and the facilities of transfer by a well regulated system of registration, would materially induce the investment of capital.

“That with respect to the investment of capital in the cultivation of the soil, a reform in the construction of the clauses in ordinary leases or agreements, with permission to remove buildings erected by the tenants, and compensation for unexhausted improvements, would naturally conduce to the investment of capital by the tenant farmer: But—

“That it appears from statements submitted to the meeting that the cost of raising agricultural produce preponderates so much over its present value, that either an increase of prices, or a reduction of expenses, must take place before capital will be freely invested in land.”

Private Money Drainage Act (12 & 13 Vict. c. 100).—The working of this act is placed under the jurisdiction of the Inclosure Commissioners. By this act, after application made, notices given, inspection of the land by the officer of the commission, any person in the actual possession or receipt of the rents or profits of any lands (except any tenant for life or lives, or for years, holding under a term or agreement for a lease, on which a rent of not less than two-thirds of the clear yearly value of the premises comprised therein shall have been reserved, and except any tenant for years whatsoever holding under a lease or agreement for a lease, for a term which shall not have exceeded twenty-one years from the commencement thereof,) may borrow or advance money for drainage, and charge the same on the inheritance. Upon the commissioners being satisfied of the due

execution of the work, they may grant a rent-charge for twenty-two years indefeasible in title, and chargeable upon the land prior to all other charges, except tithe rent-charge, chief rents and taxes. See also 13 & 14 Vict. c. 31.

The provisions of the Drainage of Lands Act of 1849 have been amended by a bill brought into the House for the improvement of land and farm buildings by loans, and advances of private money for the erection and repairs of farm buildings on lands in Great Britain and Ireland, and it provides that landlords may borrow money on the security of rent-charges upon the inheritance of the land sought to be improved, to the extent of eighteen months' value of the land, without any preference over existing heritable securities or rent-charges; the commissioners appointed to authorize such loans to be satisfied that the applications for the same will be of permanent benefit to the *subject*, and the real charges granted in respect of any loan may be made payable for any period exceeding twenty-two years; the provisions and directions of the Drainage of Lands Acts are to be followed out: but this bill was eventually thrown out in the House of Lords.

The Episcopal and Capitular Estates Bill has just passed through both Houses of Parliament; the management of ecclesiastical estates under the late system being unsatisfactory to the church and its lessees: to the one because the property is less productive than it ought to be, and to the other because the uncertainty of leases prevents the employment of capital, and encourages an imperfect method of cultivation. "Suppose," says Lord Carlisle, "a farm worth 100*l.* per annum is to be let on lease for twenty-one years, renewable every seven. At the end of seven years, the farmer applies, on payment of a fine, to have another term of seven years added to the fourteen years, which are yet unexpired. It is said that a septennial fine of 150*l.*, which would be the amount of a fine on the supposition that a year and half's balance was the *lineal* fine, is equivalent to a permanent annual rent of 25*l.*, to commence in present, the rate of interest being assumed at 4*l.* per cent." Now if the lessor is determined to have his lease out, he will receive no fine, and will become entitled to enter on this farm of 100*l.* per annum.

It is found that a perpetual rent of 100*l.*, to commence fourteen years hence, is equivalent to a perpetual rent of 63*l.*, 3½ per cent. Now it is proposed by the commissioners to divide the advantage between the lessors and lessees. (Sir W. Oughton's evidence before the Committee of Agricultural Customs (1848). On Church Property, Q. 4360.)

The Lords' Report, upon which the present bill is founded, advises, as a mode of adjusting these respective rights and claims, that one more renewal of leasehold terms, having less than twenty-one years to run, shall be made upon the accustomed fines, and that the sale of the reversion (or the purchase of the leasehold term) shall be made at a rate of interest at which the value of the fee-simple shall have been calculated. All sales or purchases to be subject to the approval of the Church Estates Commissioners and of the Ecclesiastical Commission. The increased funds arising from such dealings are appropriated exclusively to the purposes of church extension, subject to the provision that regard is to be had to the state of the parishes wherein the funds arise.

The Farm Buildings Bill and Bill to improve the Law of Landlord and Tenant, in relation to emblements, to growing crops seized in execution, and to agricultural tenants' fixtures, require notice.

The object of the Farm Buildings Bill is to extend the provisions of the Drainage of Lands Act, 1849, to the advance of private money for the erection and repair of farm buildings on lands in Great Britain and Ireland.

The Leases Bill has reference to three objects: the rights to emblements, growing crops seized under execution, and agricultural tenants' fixtures. In respect to the first of these objects, the law in relation to emblements, says the editor of the *Mark Lane Express*, "We consider the proposed alterations a judicious and practical amendment based upon common sense. The establishment of the ordinary relations of landlord and tenant until the expiration of the current year, instead of the present claim to emblements, is a decided improvement. In respect to the second object, the rendering growing crops seized and sold under execution liable for accruing rent, so long as the same shall remain on the land, we decidedly object to a general enactment so far as regards the rents which may accrue from the land upon which the crops are growing. We should consider it fair that the produce should be liable; but we are of opinion that the law of distress for rent, as it now stands, gives an unfair advantage to the landlord over other creditors, and operates prejudicially to the tenantry as a class."

The new act relating to landlord and tenant came into operation on the 1st of August last, 14 & 15 Vict. c. 25, for improving the law of landlord and tenant in relation to emblements, to growing crops seized in execution, and to agricultural tenants' fixtures; it enacts, that on the determination of leases, or tenancies under terms for life, instead of claims for emblements,

the tenant shall continue to hold and occupy such farms or lands until the expiration of the current year; growing crops of the tenant sold under an execution shall, in default of sufficient goods and chattels, be liable for the accruing rent, notwithstanding any bargain, sale or assignment which may have been made or executed of such growing crops by any such sheriff or other officer.

A tenant may also remove the buildings and fixtures erected by him on a farm, unless the landlord shall elect to take them.

Further, it is provided, that on a tenant quitting the place, leaving the tithe rent charge unpaid, the landlord may pay the same, and recover it from the first-named tenant as if it were a simple contract debt, but the act does not extend to Scotland.

What can be done at this crisis is a very natural question. A parliamentary committee has reported that many landowners have not the power, under the present state of the law, to grant such agreements as are necessary to justify tenants in expending their capital on the land, so it is quite clear that some alteration must be made in the law before such expenditure can reasonably be expected. What should the alteration be? Commissioner Fane proposes that the present state of the law should be reversed, "that the law should be just instead of unjust;" so that when there was not a written agreement to the contrary, the outgoing tenant should be entitled to a fair valuation for judicious expenditure made at his expense.

Firstly. The law of landlord and tenant should be amended, to enable British farmers generally to try for the first time how cheap they (with security for their capital expended on improvements) can produce food for their countrymen.

2ndly. A moderate fixed duty, say 1s. a bushel, on foreign corn, not so much on colonial corn, as an equivalent for the taxes, &c. that British grain is liable to.

3rdly. To compensate consumers for any small increase in the price of bread, caused by duty on corn, the present duty on tea might be decreased from 2s. 1d. to 1s.

4thly. The duty on malt should not in fairness be more than on foreign grain; these could be made equal, or 1s. a bushel under a new system.

5thly. The burdens of land should be fairly adjusted; for instance, the county should not be liable to more than a fair share of the expenses of prosecuting and keeping poachers; and each game preserver should pay one-half of the expenses where he is the prosecutor.

E. B. A.

ART. VIII.—JUDICIAL CHANGES AND JUDICIAL
CONDUCT.

VERY creditable to the sound judgment and its disinterested exercise by the government are the new appointments to law offices.

First, we have the promotion of Lord Cranworth and Sir James Knight Bruce to the new office of Lords Justices.

We believe Lord Cranworth's reputation to be without question the highest of any lawyer of his times. In private life he is as much beloved for his virtues and urbanities as he is esteemed in public life for his rare abilities, his profound legal knowledge, and his perfection as a judge. With Mr. Justice Patteson on the bench, it would be wrong to say that none of his brethren had attained to similar judicial excellence in *either* branch of jurisprudence, but very surely have none ever equalled him in *both*. The government and the country are exceedingly fortunate in so auspicious a selection, and so valuable a model for their future judges.

Sir James Knight Bruce enjoys, even among his many friends, a more qualified esteem; and suffers among those who dislike him an hostility which has recently found an exaggerated utterance in the invective of the "Times" newspaper, for which the somewhat cynical criticisms, in which the Vice-Chancellor often indulged, have afforded some degree of justification. Nevertheless, the "Times" has, we think, dealt over-severely with excesses of satire on the part of Sir James Knight Bruce, which were themselves very greatly palliated by the follies and blunders which provoked them, and which have moreover met with frequent and well-deserved castigation at its own hands.

However due it may be to the dignity of the legislature to treat its acts with respect, it is not the less due in the legislature to treat the country with practicable laws and intelligible statutes. In this duty its failures are frequent and flagrant; and it appears to us that the censure thus richly merited can scarcely be applied with equal propriety or effect than by the judges themselves, who are educated and appointed to examine and administer them. Sir J. Knight Bruce is far from being without the sanction of high models for a similar course, and condemnation of the loose and confused language, as well as the conflicting and absurd provisions and omissions of statutes, *have proceeded from nearly every judge on the bench*; the sole distinction being that the late

Vice-Chancellor lent a degree of caustic contempt to his remarks, which sounded less judicially and perhaps less seemingly in the ears of the bystander. Beyond this, we believe, there was no substantial difference between the random shots of the Vice-Chancellor and the more technical artillery of the Queen's Bench.

It will be well if the comments already made should add weight to the conviction, which will naturally possess the new judge's mind, that the tone and manner of his sallies must undergo an entire change in the august sphere to which he is now promoted. Everything else combines to recommend this appointment. The politics of Sir J. Knight Bruce are a proof of the high estimate of his judicial merits, which could alone have induced the government to promote an opponent of their policy and party. The almost unanimous opinion of the profession at the Chancery Bar, moreover, pronounces Sir James as the most effectual of law reformers on that side of Westminster Hall, without going one step in aid of the legal *bouleversement*, so fashionable in certain quarters. No judge who ever sat there has striven more effectually to realize to suitors that broad measure of practical equity, which has never on his hands suffered restriction from the fetters of technicalities, or the impediments of that refined order of special pleading which becomes casuistry and results in injustice. No judge living has done harder work, or striven to administer more substantial justice with a more determined purpose, or in a more sincere and right intentioned spirit. We cordially concur with the "Spectator" newspaper that "he is famous for having done all the work of his own court, and that of two other courts into the bargain, at a time when reforms in practice and an extension of jurisdiction had brought into all the Chancery courts a greater quantity of business than they had ever entertained; and he is notorious for the generous industry with which he frequently volunteered to do the drudgery work of the Master's offices, which are subsidiary to his own court, simply because he cannot bear 'to see these poor people put to unnecessary expense.'"

Mr. James Parker, who was called to the bar in 1829, and whose professional career well warrants his promotion, and Mr. Kyndersley, a Master in Chancery, not perhaps equally noted for his success in that office, are the new Vice-Chancellors, vice Lord Cranworth and Sir J. Knight Bruce. Mr. Parker is a conservative, and politics have thus been again laudably disregarded in his appointment. This, therefore, is a very fit and proper selection.

Mr. Bethel has succeeded Mr. Page Wood as Vice-Chancellor

in Lancaster; and this very excellent choice speaks well for Lord Carlisle.

Two very painful episodes have, nevertheless, occurred in this series of gratifying events: one is the approaching retirement of one of the very ablest, most patient, learned, and amiable judges who ever adorned the bench. Whilst in the fullest enjoyment of his acute and masterly intellect, Mr. Justice Patterson is taken from the bench by the growing infirmity which has been stealing on him for years past. Deeply as we deplore the calamity of such a loss, it is impossible to deprecate the decision taken. The deafness of the truly excellent judge rendered it difficult to himself to do justice to the cases he tried. We have seldom had more reason to lament the shortcomings of medical and surgical art in the removal of infirmities which would seem to be little else than mechanical derangements susceptible of simple remedies. Mr. M. D. Hill and Mr. Watson are named as probable successors, and it is not by any means impossible that vacancies for both these appointments may shortly occur, another of the learned judges being in a state of health which gives cause to apprehend his speedy retirement from judicial labour.

The County Court judge's conduct at Liverpool forms the second subject of lamentation; but inasmuch as it is sub judice, we refrain from further comment on it. It were unjust however to Mr. Ramshay to condemn his defects of courtesy and dignity of demeanour and language, without lamenting a pernicious example set, though certainly no excuse afforded to him, in a still higher sphere. In our humble judgment, next to a sense of justice, there is no qualification more essential to a judge than that of being a gentleman. It is an attribute of far more constant use and power than even that of legal attainment, and commands far more general and unfailing deference. A clear head and a kind heart are alike indispensable; and the immense powers now wielded by the new order of judges, as well as by their superiors, render it more than ever essential that they should be thus recommended to public favour; especially in a country like this, where few things which are unpopular are ever beneficial, and where neither bluster, abuse, or pomposity are often mistaken for dignity, even by the lowest classes of the people.

ART. IX.—THE PROSPECTS OF THE BAR.

THE business in the superior courts is gradually but steadily sinking. The body of men whose education has had the pursuit of advocacy in these courts as its object, and the emoluments of practice in them as the incentive and reward of their efforts, suddenly find the foundations of their prospects undermined, and their just hopes and ambition in great measure, if not wholly, jeopardised.

The most far-sighted of the organs of public intelligence thus expresses the views which this state of things presents to the mind of the impartial observer :—

“The change now going on in all the relations of the legal profession is becoming every day more manifest—is marked by circumstances of increasing significance, and must at length attract the attention of society at large, which for the most part does not consider itself personally interested in the great social revolution which is at the present moment almost accomplished. There are few of us, however, who are not in some way almost immediately concerned in the fortunes and condition of the acute, educated, and powerful class by which the law is administered, and by which it is in a great degree framed and enacted. That this class should be made subject to ennobling rather than degrading influences, that the morality it adopts for its guidance should be wise and honourable, and that the immediate rules in obedience to which professional conduct is to be directed may be such as intelligent gentlemen can cheerfully follow, are matters in which every class of the community has a deep, continued, and ever pressing interest. If the persons by whom the law is administered are generally disesteemed, the law itself will soon come into disrepute. If the lower forms of the legal profession are not bound by strict principles of honour, the high places in the law will soon be found occupied by men not deserving, and certainly not receiving, the respect and regard of society. The unhesitating submission to judicial decisions which has for ages been among the most striking and beneficial distinctions of the English people will soon cease to be felt or evinced, influence and solicitation will be employed to sway the tribunals of the land, and the many miseries which attend upon a corrupt judicature will inevitably follow.

“In thus deducing vast consequences from apparently insignificant sources, let us not be accused of dealing with imaginary evils, and of exaggerating the effects that may attend upon the social changes which even the least attentive among us must perceive to be at this moment in progress. These changes we sincerely believe may be made the occasion of great benefit to the commonwealth. They may also, we fear, if not wisely managed, lead to unspeakable mischief. The good and the evil are in the hands of society itself. By it the character of the change must be in effect determined.”

These extremely well put remarks form a very apt text for the suggestions which we are about to make as to the provisions of the County Court Extension Bill, which was not passed last session, but which it is intended to reintroduce in the approaching one.

The Bar is being rapidly stranded; and, deprived of the business which used to flow into the accustomed channels, is now sedulously excluded from the new ones. The determination of the attorneys to exclude the Bar from the County Courts is at present likely to prove but too successful.

The older practitioners among the attorneys do not receive the new class of business which the County Courts have engendered. It falls, on the contrary, into the hands of a body of younger men, who study the art of advocacy, with all the improved means and opportunities of cultivating it with effect, which the increased appliances of education and civilisation open to them. Being of the status of an attorney they can take the low fees which the nature of the cases and the spirit of the County Courts suggest and require, and which the conventional etiquette at the Bar forbids the barrister to accept. These men are generally competent for the work they undertake, and in many cases are even more so than the barristers they exclude. They are rendered fit by the practice they obtain, and, in default of which, those whom they supplant never can become fitter.

Thus most true is it, as Lord Denman has said, in his letter to Lord Brougham of June 1st:—"The present state of things threatens the annihilation of the Bar as a class in society; for I think we cannot doubt that the public mind is decidedly in favour of the change; and I hear from all quarters that the most eminent men of the profession for the most part sit idle in court, and that the juniors are losing all hopes of succeeding in the world as barristers. Nothing, surely, can be more preposterous than the state of Westminster Hall contrasted with the County Courts—that some of the best judicial talent the country ever enjoyed should be unemployed, while business flows with a redundant stream to men comparatively unknown."

Such are the County Courts compared with the courts at Westminster; and so they will continue to be so long as the attainment of justice, which is prompt and inexpensive in the former, is tedious and costly in the latter. Lord Denman's suggestion of the remedy is founded on the fate of Mahomet, who was forced to go to the mountain, inasmuch as the mountain would not come to him.

The courts of the superior judges must be assimilated to those

of the counties. There should, Lord Denman thinks, be "such a reform of abuse, such a sweeping abolition of fiction and verbiage—those pets of English lawyers—the establishment of such an intelligible course of procedure in our courts, as will be satisfactory to the public and conducive both to the honour and interest of our profession."

With great deference to the noble and learned lord, this can only be achieved by making the superior courts almost on a footing with the County Courts. That is the only standard of what is "satisfactory to the public."

The first step towards doing this is to multiply the circuits to at least six times a year; to reduce the fees to the same or nearly the same amount as the County Courts; to give them exclusive jurisdiction in all suits where more than 50*l.* is claimed; and in all those actions which they now have an exclusive right to try, such as ejection, libel, &c. The pleadings, moreover, would require to be reduced to the same level as in the County Court suits. The superior courts, or a single judge in either of them, should also hear all appeals from the inferior courts. Exclusive audience should be of course reserved to barristers in the superior courts. One judge would suffice for each circuit.

If such measures be adopted, the profession of the Bar may be preserved with benefit instead of injury to the public. Any other mode of doing so will only degrade the profession and deteriorate the character of public justice, by making the interests of the nation subserve those of an isolated class.

We confess that we are and have been prone to cling with great partiality to our old and revered forms of law; perhaps too much so; and to hope, even against hope, that a system, the parent of so pure a jurisprudence as ours, might well—with moderate adaptations to the progress and requirements of the times—continue and endure with the empire it has strengthened and adorned. This seems to be no longer possible; and alterations of a character far beyond administrative changes and mere improvements must be inevitable, when they are recommended by a mind so masterly, and a judgment so matured, as those of Lord Denman.

It is indeed no vain fear which the learned Lord expresses, that the present system may end by extinguishing the very class of men from whom the judges of both courts can be supplied. We confess that we see no other means of keeping the Bar in existence, than such an one as we have ventured to trace.

The project recently entertained, of allowing clients to instruct counsel, is so derogatory to their position, and would prove so

subversive of their respectability, that we trust it will not be renewed. It might, however, be advantageously provided, that in all cases tried, even in the County Courts, where the damages are above 20*l.*, counsel should have exclusive audience wherever three barristers were present. This would make a very material difference, and secure them some amount of business in these courts; *the attorneys, in such cases, being also secured their fee as at present.* The entire addition to the suitor would be the 1*l.* 3*s.* 6*d.* payable to counsel, and this would surely be no serious drawback from the economy of an extension of cheap justice—so great, that from 20*l.* to 80*l.* are saved in the great majority of causes over the old mode of trying them.

The abandonment of the old system of Pleading seems to be the sore point with a large portion of the profession. Now the object of pleading is simply to advertise the parties respectively of the cause of action and the kind of defence, by means of which a triable issue is joined. This is done every day in the County Courts when the suit is about to be heard. The great objection arising from this is, that, although the judge may easily take care that the issue is properly raised, it may so happen that it is one which either of the parties may not have anticipated, and the proceeding with the trial would under such circumstances be an obvious injustice. The remedy is to give the judge full power to adjourn the hearing, on such terms as he may think fair. This is done in the County Courts, and it certainly is attended by very little if any inconvenience.

The "Times" thus comments on the prospect opened to the profession by the County Courts :—

"But if, as we believe, the chief legal business will hereafter be transferred to the County Courts, the character, the rules of conduct, and the established morality of those who practise in those courts assume an importance equal to that hitherto attaching to the rules of Westminster Hall. The immense body of persons who have hitherto been accustomed, in the various characters of attorneys, barristers, and judicial functionaries, to contribute to the administration of the law in the metropolis, will, in fact, soon be scattered in separate groups over the country. The great mass of business will be done in the county courts. The law will be kept uniform by means of a central court of appeal, for which a very restricted bar will be found sufficient. If this great change is effected rapidly, as everything induces us to believe it will be, the practical question is immediately suggested—will it be wise to continue the distinction heretofore existing between the two branches of the profession, and thus enable a provincial bar to arise round each county court, with all the rules which have been hitherto adopted, or shall we entirely break down the distinction between barristers and attorneys, and trust to chance

for the good government of those by whose means the law is to be administered? We certainly ought to bear in mind that throughout the United States of America the barrister and attorney are one—the client from whom you to-day have received your instructions you may to-morrow represent in court. In the populous cities of the United States the division of employments does indeed arise, although the law unites the characters of counsel and attorneys. Legal firms, consisting of two or more partners, divide the labour of the profession among them—the one partner seeing the clients, the other representing them in court. But the advantage which we believe to follow the legal division, in the shape of a more nice and strict rule of conduct, is not so likely to result from this merely convenient arrangement. Eager competition will become unscrupulous. The supervising public not being numerous, the profession not being guarded by a body of leaders peculiarly amenable to public opinion, rapacity and recklessness may, we fear, become the characteristics of the lower grades of the judicial hierarchy—corruption of the higher.”

We trust no such amalgamation will ever occur as that which subsists in America: it must lower the body from whom our judges spring, and the whole status of jurisprudence be deteriorated, an evil for which no convenience could compensate.

ART. X.—LORD CHANCELLOR COTTENHAM.

WITHIN a few days of the decease of Lord Langdale, his more distinguished contemporary, the subject of the present notice, followed him to the grave.¹ Long friendly competitors at the bar, and practising constantly in the same court, they both took their seats in the House of Lords on the same day, at the opening of parliament in 1836: they both in their turn presided as Master of the Rolls in the court in which they had worked out for themselves fame and fortune; and there is but little doubt that, had Lord Langdale's health permitted, he would have succeeded his friend and rival on the woolsack. The promotion was in each instance at first unlooked for, and regarded with suspicion by the public and the bar: but both judges vindicated by their conduct on the bench the discernment, or the good fortune, which had marked them for such elevation.

It can hardly be doubted, however, that great as were the judicial qualifications of the late chancellor (and notwithstanding all his faults, we would point him out as one of the greatest judges that have ever adorned the bench) it was his political

¹ Lord Langdale died at Tunbridge Wells on Good Friday, 18th April, 1851: Lord Cottenham, at Lucca, on the 29th of the same month.

views which chiefly led to his promotion. And a more unflinching partisan never earned a coronet. The judicial excellence which he displayed after his elevation was a matter of surprise to all—to none more than to the political friends who had placed him there. No display of talent, no early promise, no vigorous effort of mature years, could have influenced the selection. Entering at the usual time at the University of Cambridge, he took the degree of B. C. L. at Trinity, in 1803, without any extraordinary distinction:¹ and he had long before he took his degree (an unusual proceeding) entered his name on the books of Lincoln's Inn, so early as January, 1801, when he was little more than nineteen years of age: a pledge at once and an earnest of his self-dedication to the genius of law. He studied the usual time at the chambers of a special pleader; having selected for that purpose the guidance of Mr. Tidd, the celebrated legal foster father of so many of our most eminent judges during the last twenty years. As Mr. Pepys intended to practise exclusively on the equity side of Westminster Hall (an intention to which, although at that time unusual, he strictly adhered) he continued his studies after quitting Mr. Tidd's chambers, under the auspices of the late Sir Samuel Romilly, and was called to the bar in 1804. But notwithstanding the early and undeviating devotion with which he had thus steadily completed a course of study much longer than that previously undertaken, the golden fruits of so much and such particular toil were not to be plucked yet. It was not until the year 1821, when he had completed the mature age of forty years—a period to which a successful barrister rarely defers his settlement in life—that Mr. Pepys felt sufficient confidence in his future to undertake the responsibilities of a family. On the 30th of June in that year he married the daughter of Mr. Wingfield, and niece to the present Earl of Digby, by whom he has had twelve children, six sons and six daughters, all of whom, we believe, as well as Lady Cottenham, survive. And it was not until the close of the year 1826, twenty-two years after he had been called to the bar, that Mr. Pepys exchanged his stuff gown for the silken dignities of a king's counsel. With the long delay however of such promotion, his political views may have had something to do; though this is improbable, Mr. Pepys never having up to that time taken any part in public life, and his first efforts when he did at length venture upon the arena of the House of Commons, not being such as either to excite exultation among his friends, or to inspire terror in the ranks of his opponents.

In 1830, however, he made his first step in that political arena, where he was destined so shortly afterwards to play one of the

¹ There was at that time no examination in going out in law.

most prominent parts ; being named Solicitor-General to the Queen-Consort. And in 1831 he made his first appearance in the House of Commons, representing Lord Fitzwilliam's borough of Malton, for which he was, on his subsequent promotions as Solicitor-General to the crown, and Master of the Rolls, from time to time re-elected, and for which he continued to sit until he took his seat in the House of Lords, as Chancellor, at the opening of Parliament, in 1836.

His first essays at St. Stephen's however, though respectable, conveyed no promise ; and the most that can be said for his last efforts in the Lower House is, that they disappointed none. During the five years in which he occupied a seat in the House of Commons, whether as a private member, or while connected with the government, he spoke but seldom ; nor did any of his speeches aim at being more than common sense ; praiseworthy chiefly in this, that they never descended to commonplace. However, the liberal party at that time were absolutely suffering the last straits of famine for want of legal talent ; and after shelving more than one unfortunate experiment as incompetent or impracticable, they at length found themselves reduced (as it was thought) to Mr. Pepys ; who accordingly was, in February 1834, appointed Solicitor-General (in the place of Sir Wm. Horne, who retired to a mastership in Chancery), and knighted : and in the month of September following the same inevitable necessity, which appeared to guide the steps of the then ministry in lieu of choice, raised Sir Charles Christopher Pepys, on the decease of Sir John Leach, to the Mastership of the Rolls, and the honours of a Privy-Councillor. Little did they know the man when they placed him there : little did they suspect how invaluable the ally would eventually prove, whom they were thus putting in training for the woolsack.¹ And well it was for Sir Charles that the appointment sheltered from the storms and uncertainties of politics, fell vacant at the time it did ; for in the ensuing month the liberals being no longer able to carry on their maladministration, at least in the then state of feeling of the country, resigned, to make way for Sir Robert Peel's brief but brilliant ministry of 1834-5.

¹ The flourishing eulogium of the new Master of the Rolls by Lord Brougham, on taking leave of the Court of Chancery (3 M. & K., last page) goes for nothing. The length of time the seals remained in commission after the re-advant of the Whigs to power is unanswerable. Sir Charles was known to be a keen partisan ; if he had been also known to possess such admirable judicial powers as Lord Brougham's eulogium expressed, why was he not made Lord Chancellor in 1835 ?—What attribute did he want ? There was no competitor, whose rival merits could perplex the ministry. Yet the seals remained in commission for eight months.

The Whig ministry, however, shortly returned to power: and on returning, felt more severely than ever the dearth of legal talent at their disposal. They could not restore the Great Seal to Lord Brougham: and yet there was not another hand to whom they could think of confiding it. So little confidence had the leaders of the party, or rather so little knowledge of, their future model Chancellor, then Master of the Rolls, that the Great Seal was actually in commission from the time of their accession to office in April, 1835, till the following January: Sir Charles Pepys being however first Lord Commissioner. (The other commissioners were the late Vice-Chancellor of England, Sir L. Shadwell, and Mr. Justice Bosanquet.) But after a year's experience of the vast learning, temper and discretion of Sir Charles upon the bench—perceiving the full satisfaction and confidence felt by the Bar and the public in the appointment—constrained also by the absence of any other tolerable alternative—they literally made a virtue of necessity, and took credit for discernment in making an appointment which circumstances had rendered inevitable. And never did fortune serve them better. Their choice amounted to this, that they obeyed the dictates of necessity. But if they had chosen from the whole Bar, past and present, of England, the event could not have reflected greater credit on their judgment.

Yet Lord Cottenham had, as a judge, very considerable faults: faults which became more palpable on his second Chancellorship, from 1846 to 1850, than they had been in his first tenure of office, 1836 to 1841. And the memory of this later and less brilliant period is fresher in men's recollections, and has somewhat obscured the lustre of the earlier period. Certain it is that his reputation would have been less obvious to detraction had he never returned to office.

His chief defect was an indomitable obstinacy of adherence to an opinion which he had once formed: and as his lordship, like most other legal celebrities, was sufficiently expeditious in forming an opinion, it was a matter of some anxiety to place the right view of a case before him at once, or at least to be careful that nothing should be fixed on his attention which might prevent his taking a just view of the case. Fortunately his clear and acute mental vision rarely allowed any material fact to escape observation, and rarely, too, allowed any flim or sophistry to strut about in the garb of truth without speedy detection and exposure. Still this did happen, sometimes: and although there seldom has been a judge who was more right, when he was right, yet when he did go wrong, he went wrong with a vengeance. And it was as hard to overcome a false view as a

just one, when he had once declared himself. It was on some such occasion that it is reported of a very eminent practitioner in Chancery, now a still more eminent judge, that when a client was urging him with the utmost anxiety to apply for a rehearing of a cause in which the Lord Chancellor had just delivered a very decided judgment under a palpable misconception of the facts of the case, he refused to make any such application, adding, "And I tell you more, sir—that if an angel were to come down from heaven to ask the Lord Chancellor to reconsider his opinion after such a judgment as he has just given, he would most probably commit him for a contempt."

There were however occasions on which he changed and even reversed his own opinions, as in the very celebrated cases of *Tullett v. Armstrong* and *Scarborough v. Borman*.¹ These cases were among the earliest, if not the earliest, decisions of Lord Langdale after his elevation to the Rolls—and in them he had decided certainly according to the notions and practice of conveyancers, but directly in the teeth of repeated decisions, or at least dicta of Sir John Leach, Sir L. Shadwell, Lord Brougham, and of the then sitting Lord Chancellor himself. We well remember the state of anxious suspense in which the "adust conveyancers," as the "Times" calls them, were kept during the long twelve months during which Lord Cottenham retained these cases under his consideration. While at the Rolls, following in the wake of Lord Brougham and of the then Vice-Chancellor of England, he had been willing to deny any efficiency to the "separate use" clause, unless it referred to a person actually a *feme covert* at the time. In *Massey v. Parker*,² he seemed as incapable as Lord Brougham had expressed himself to be, to understand how there could be a "postponed" fetter of such a description, as to be no impediment while the donee remained unmarried, but to bind the instant she married, and again to drop off if she became a widow. But finding afterwards, as he did, what consternation was excited among conveyancers, and what a vast number of settlements would be disappointed by the overthrow of the "separate use" doctrine as established previous to *Massey v. Parker*, and that class of cases, he (not unhesitatingly, for the effort cost him twelve months' deliberation) recanted. And certainly not very candidly or gracefully, for his judgment is full of heavy and awkward attempts to show that in fact he had not quite meant to decide in his previous judgment, what he really had decided. However the retraction was complete, and the doctrine established, by his judgment, on the firmest foundation.

¹ 4 Mylne & C. 377.

² 2 M. & K. 174.

The tenacity of opinion which led him in *Tullett v. Armstrong* to attempt to prove that he had never held what he in fact was even then overruling, was evinced in several other cases in which he decided (as we think) in conformity with the real justice of the case, but professing all the while to go in conformity with previous decisions, which he endeavoured to twist round to his own view of the case. Thus in *Craddock v. Piper*¹ he decided that a solicitor, who being a trustee, acts as solicitor to the trust, is entitled to his costs as such solicitor: a decision in consonance, we think, with justice, and with real convenience, but certainly contrary to all preconceived notions, and to the practice of all the present generation, founded too upon decisions which even the Lord Chancellor was bound to respect. But rather than give up his opinion he undertakes, in his judgment, to explain away all these decisions, as not having the meaning which everybody else, even though with reluctance, allowed to them. We understand that already some very nice distinctions have been taken on this judgment by a very eminent judge recently appointed. *Devisme v. Devisme*² is another case in which Lord Cottenham, finding previous decisions in the way of the judgment he was desirous of giving (and which judgment we here again consider to be much more equitable than the previous decisions the other way), boldly proceeds to explain away all cases which fetter the declaration of his opinion in a manner which he would have been the last judge to tolerate in another.

One of his remarkable peculiarities (but which also sometimes degenerated into a fault) was a curt, acute way of addressing counsel when making some representation which he conceived to be ill founded, either in facts or logic. No judge would ever less submit to the slightest suspicion of being "bamboozled;" and as soon as any argument was advanced, which he thought ranked under that category, he would embody it pithily in a short sentence or two, and place it before its astonished author, whether in silk or in stuff, to his utter discomfiture. "It is very awkward," observed one of the counsel most frequently employed in his court, "he just puts it to you shortly, and asks, 'Is that your argument?' adding quietly, 'I only want to know—that's all;'" and then, when he sees he is right, he sinks back in his chair, and it is all over."

But this quickness of perception in himself rendered him somewhat intolerant of the slower capacities of those with whom he had to deal; and upon them he often, with indecorous abruptness, poured forth the measure of his wrath—an exhibition the

¹ 1 M'Naught. & Gor. 684.

² Ibid. 336.

more indecorous, as the expressions which he used in his indignation were often barely intelligible. In fact, in the later period of his reign, his articulation had grown so indistinct,¹—his voice had grown so extremely weak, scarcely ever rising above a whisper, and his temper had grown so irritable, that it was no pleasant thing to have to go before him. Nor was it only to the Bar that these failings were a source of difficulty and annoyance. His notorious antagonism to V. C. Knight Bruce was the subject of every-day remark, and occasionally led to very serious mischief. Thus in *Ex parte Barber*, a petition for winding up the London and Manchester Railway (Remington's Line) was dismissed by V. C. Knight Bruce, on the ground that the company, being only provisionally registered, was not within the Winding-up Acts. But Lord Cottenham overruled that dismissal, and made the order; thereby flooding the Masters' offices with winding up these companies, and opening the doors to endless litigation, infinitely better kept away; and finding that his opinion was deemed erroneous, and would probably be evaded, he had sufficient influence and such tenacity of opinion as to procure a clause to be inserted in the next Winding-up Act (for of course there was another in the next session), in which his own view was adopted and made law, to the gain of no good man, and to the great distress of many unwary persons, who, though they at one period of their lives had thought well of some plausible but birth-strangled scheme, never had been guilty of anything worthy of the tortures of the Master's Office.

The same unbounded confidence in his own judgment led him to upset rather than overrule the decisions of other judges as well as of V. C. Knight Bruce. Witness *Smith v. The London and North-Western Railway Company*, in which he demolished a judgment of Sir L. Shadwell's; but which reversal has been disapproved of since both by Lord Truro and Lord Cranworth. And in one case within our own knowledge, he used such insulting expressions (but which, however, are carefully kept out of the Report) in reversing a judgment of a most estimable judge (whose retirement and the occasion of it has been deplored by the whole profession), that it drew from this latter the remark,—“I have no objections to my judgments being overruled; but I am not prepared to have such observations made in open court as he made in that case.”²

He retained his political bias in all its intensity in his cha-

¹ We heard one day a proposal made, by way of a joke, for the bar to present the Chancellor with a subscription-set of teeth. But some such remedy was in sad earnest very much required.

² *Dawes v. Betts*, 12 Jur. 709.

acter of Lord Chancellor—or rather, it was when he became Lord Chancellor, and during his tenure of office, that his political bias became matured and an effective motive of action. We do not mean that he imported political bias into the Court of Chancery, so as for a moment to favour either party according to his political antecedents. But he surpassed perhaps even Lord Eldon in political bigotry, and let slip no opportunity of displaying it. A notable sample of this occurred in the first year of his first chancellorship. The Municipal Reform Act had been passed in 1835, by a clause in which, relating to charity property held by the corporations, and providing for the appointment of separate trustees of such property, it was provided that the Court of Chancery should appoint trustees of such trust estates as were not duly separated and conveyed by the 1st August, 1836. Lord Cottenham was but Master of the Rolls and Lord Commissioner when this act passed, and could even himself have scarcely presaged his advancement to the woolsack when that fatal 1st of August, 1836, should have come round. It did so happen, however, that Lord Cottenham and Master Brougham between them (Master Brougham happened to be the Vacation Master in 1836—here, again, it was impossible there could have been any fore-knowledge or contrivance when the act was being framed) had the appointment of the trustees of nearly all the charity estates held by municipal corporations in the country; for, as a matter of course, scarcely any had arranged their affairs by the day in question. The partisan faculties of the persons entrusted with the appointment was manifest by a majority being given, with, we believe, scarcely a single exception, to the Radical party; although, certainly, the municipalities were much rather conservative in their inclinations. Another equally glaring instance was given near the end of his career—*qualis ab inceptu*—in the appointment of County Court judges. Every one of these, sixty-nine in number, were “good men and true,”—of undoubted Whig principles—with the single exception of a gentleman who had been consulted by Lord Lyndhurst in framing the bill, upon the express promise of a judgeship.

Another striking instance of this partisan feeling was manifested in the O’Connell writ of error case in the House of Lords. Though delivering a judgment contrary to the great majority of the judges, and on a question of criminal law, in which he had never had the smallest experience, his lordship was not ashamed to conclude his judgment in the following memorable words:—“The opinion I have now expressed I formed early in the argument at the Bar. I have carefully considered

all that has been urged at the Bar or suggested by the majority of the judges, but I have not found any reason for altering my original opinion." A memorable avowal, which indeed might probably be stereotyped at the close of every judgment he ever delivered.

There has seldom probably been a judge who has left behind him fewer traditional stories. No bon mots, no racy anecdotes have we heard bandied about of his, as of almost every other eminent legal authority. His taste even in youth seems never to have been to the *literæ humaniores*—he closed all connections, even with the University, by taking his name off the books after taking his degree—he was a rugged mass of law and Whiggism, and nothing else. We should praise the bridge that carries us over; and the ex-chancellor knowing right well that he owed his success, first to himself, next to his law, and thirdly to his party, and to nothing else, seems to have given his affections to these three objects in the same order,—and to nothing else.

His efforts in the cause of Law Reform were neither very great nor very successful. He made, it is true, a great speech on the subject of chancery reform in 1836, but he clung to every detail of his plan with the invincible pertinacity which seemed to pervade every action of his life; and when he found it impossible to centre all attention and to support his own plan in every point, he seemed reluctant to assent to reforms which carried out even his own views in part only. The other great effort to which he was a party was embodied in the Orders of 22nd April, 1850, providing the new method of claims in chancery. But his last and fatal illness too quickly followed the issuing of those Orders to allow any criticism to be made upon his views in making this great alteration.

Notwithstanding the utter prostration of his bodily health prevented his almost ever sitting in chancery during the last year of his official career, his mental vigour continued little, if at all, subdued; and his hand still clasped the seals. At last, lured by the bait of an Earl's coronet, he allowed them to devolve into other and more vigorous hands; and immediately left this country, to seek in a milder climate renovated health. But it was too late—a momentary improvement induced him to turn his steps northward—but it was but for a day; and the angel of death overtook him at Pietra Santa, in the territory of Lucca, on his seventieth birth-day.

He is succeeded in his titles and estates by his eldest son, Viscount Crowhurst, now Earl Cottenham.

R. U.

Notes of Leading Cases.

EQUITY.

SECRET—BREACH OF FAITH—INJUNCTION TO RESTRAIN USE OF, OBTAINED BY—INNOCENT PARTY.

Morison v. Moat, 18 *Law Times*, 28.

THE present will doubtless become a very leading case upon one of those peculiar branches of the jurisdiction of the Court of Chancery which arise from the cognizance it takes of the obligations which conscience and good faith may impose upon parties who are brought before it.

The present case arose out of rather complicated partnership transactions which had taken place between the Morisons and the Moats in respect of a medicine invented by one of the former and known by the name of "Morison's Pills." The chief material circumstances were these: the father of the defendant had received from the inventor upon his entering into partnership with him the secret of the composition of the pills; both were to be at liberty (under certain restrictions) to introduce a fresh partner into the firm: but while the inventor was to be at liberty to disclose the secret of his invention to a partner, the defendant's father was precluded from doing so, and on that understanding alone was it imparted to him. In fraud of his agreement he disclosed it to the defendant, who had no knowledge of it, except by such disclosure; he had also introduced first one son into the firm, and then substituted the defendant; the inventor had also introduced his two sons, the plaintiffs; various transactions had been entered into, but none materially affecting the rights of the parties; and the inventor and the defendant's father had died. On the expiration of the partnership the defendant used the secret for the purpose of making and selling the medicine, whereupon the plaintiffs applied for an injunction to restrain him from doing so, which was in substance granted by Turner, V. C., who in an elaborate judgment examined the authorities upon this subject. No patent existed in the "Pills," so that there was no property in their composition in any party. The decision was entirely referred to the moral

obligation upon a party who obtained the communication of a secret to observe the stipulations on the faith of which he obtained the revelation, an obligation not only recognised, but enforced in a court of equity.

"The true question is," observes Turner, V. C., in delivering his judgment, "whether under the circumstances of the case the Court ought to interfere by injunction on the ground of breach of faith or of contract;" and, as we have already said, his Honor was of opinion that it ought. He added, "That the court has exercised jurisdiction in cases of this nature does not I think admit of any question. Different grounds have indeed been assigned for the exercise of that jurisdiction. In some cases it has been referred to property; in others to contract; and in others again it has been treated as founded upon trust or confidence, meaning, as I conceive, that the court fastens the obligation on the conscience of the party, and enforces it against him *in the same manner as it enforces against a party to whom a benefit is given the obligation of performing a promise, on the faith of which the benefit has been conferred;*" and this last, we respectfully submit, is the correct view of the ground upon which the jurisdiction rests. Even, however, if it were not, the existence of the jurisdiction is incontrovertible, as his Honor proceeded to show from a series of authorities, to his *résumé* of which we refer our readers. The objection that to grant the injunction would put the plaintiffs in a better position than if they were *patentees* of the "Pills," was thus disposed of: "What we have here to deal with is not the plaintiffs' rights against the world, but their right against the defendant. It may well be that the plaintiffs have no title against the world in general, and may yet have a good title against this defendant." *Canham v. Jones* (2 Ves. & B. 218) was distinguished as being a case not of breach of confidence, but of invasion of property in a syrup. There, although the fraud was not committed by the defendant himself, his Honor thought the equity subsisted as against him also, observing, that "it was already a breach of faith and of contract on the part of Thomas Moat to communicate the secret. The defendant derives it under that breach of faith and contract, and I think he can gain no title by it."

It does not quite appear how far the defendant knew (if at all) when the secret was communicated to him that such communication was fraudulent.

COMMON LAW.

LANDLORD AND TENANT—DISTRESS—EXEMPTION.

Brown v. Arundell, 20 Law Jour. C. P. 30.

IN a note, in Smith's Leading Cases, upon *Simpson v. Hartopp*, which is the leading case upon questions of exemption from distress, we find it stated (vol. i. p. 192) under the second class of absolute privilege, viz. "*things delivered to a person exercising a public trade to be carried, wrought, worked up or managed in the way of his trade or employ*," that "lately it had been decided that goods deposited on the premises of an auctioneer are privileged from a distress for rent due in respect of those premises."

The present case not only supports *Adams v. Grane* (1 C. & M. 380), which was the authority for so considering the business of an auctioneer as a public trade or employ, and the selling goods a management of them in such trade or employ, as to bring the case within the rule above quoted, but it even goes somewhat further. Goods were held to be privileged, provided they were in the possession of the auctioneer for the purpose of being sold by him, although upon premises not usually used as an auction-room, and although the rent was due from a third party, a sub-tenant, or rather, indeed, a bailiff, of whom, having the key, it was by a son of his given to the plaintiff, who was, in law, nothing more than a trespasser. As to the room's being merely a private room, "Is it not," asked Maule, J., "a public auction-room as soon as a public auction is advertised to take place there?" and the same learned judge afterwards added, "If the goods are in the auctioneer's possession for the purposes of sale, they are privileged on that ground, wherever they may be."

MARITAL LIABILITY—NATURE AND LIMITS IN RESPECT OF
A WIFE'S DEBTS.

Read v. Legard, 20 Law Jour. Exch. 309.

Ambrose v. Kerrison, 20 Law Jour. C. P. 135.

THESE are two cases turning upon the obligation which the common law casts upon a husband of supplying his wife with necessaries during their joint lives in return for the interest it confers on him in all that she possesses, for that period at the least. They clearly define this branch of the law, and tend to elucidate some rather doubtful expressions to be found in some

of the earlier cases, and every way subject to the ordinary rules of principal and agent. Thus, in the case mentioned at the head of this note, in which the question was whether a husband who had become a lunatic was liable upon contracts made by his wife during his lunacy in order to obtain necessities for her subsistence, it was urged by the counsel for the defendant that the liability of the husband depended solely upon the agency which the law implies in the wife to procure all that is indispensable for her maintenance—that this was a mere ordinary agency, and that, therefore, when he became a lunatic, it was impossible that he could confer any authority upon an agent, and that consequently his wife's implied authority to pledge his credit must have expired.

Passages from the leading case of *Manby v. Scott* (2 Smith's L. C. 261) were adduced as seeming to support this view; and although many were to be explained away, as said of things *not being necessities* which a wife might make a contract for, yet in some others the sense is more doubtful. For instance, in the case quoted we read that the resolutions, in which all the judges of England agreed, were (as reported by the C. B.), "1st, that husbands are bound to supply their wives with necessities; *and here they agree DE RE, though they differ DE MODO*;" and further among the resolutions of the dissentients, "that the marriage does not give the wife any innate or uncontrollable power to render the husband liable."

The true principle seems to be, as laid down by Pollock, C.B. in delivering his judgment, "that when a man marries, he contracts an obligation to support his wife, and by construction of law he gives her authority to pledge his credit for her support under any circumstances which make it necessary, she herself not being in fault. That authority is not revoked by his becoming insane; and certainly it would be very hard if it were otherwise, for the wife is deprived of all her property by the marriage."

If therefore the wife's authority be purely that of an agent, it is a general and irrevocable one, given to her *ipso facto* and once for all at the time of marriage to pledge her husband's credit so often as she shall be in real want during coverture, and not several particular authorities severally springing out of each occasion of her so being in want of necessities. In the other case (*Ambrose v. Kerrison*) it was not only held, as might be expected, that a burial suitable to the condition of the wife came within the category of necessities, but also that in that particular case, in which she happened to be living separated from her husband, that he was liable to a third

party, who had volunteered to defray the expenses of such an interment, for the money so expended as for money paid to his use.

COPYRIGHT—ALIEN FRIEND'S RIGHT TO—FIRST PUBLICATION IN THIS COUNTRY—RESIDENCE OF AUTHOR ABROAD.

Boosey v. Jefferys (in error), 20 Law Jour. Exch.; S. C. 17 Law Times, 110.

THIS very important case may, it is hoped, be regarded as definitively settling a doubtful point of law, concerning which there has been an immense amount of litigation. The facts material to the decision were shortly as follows. A foreigner composed certain airs abroad, and there assigned them (validly by the laws of that country) to another foreigner, who came to England and here legally assigned them to the plaintiff, by whom they were published here simultaneously with their publication abroad, and entered under the 5 & 6 Vict. c. 45, and also at Stationers' Hall. He likewise deposited copies at the British Museum. The defendant having subsequently published and sold them, the present action was brought by the plaintiff for the infringement of his copyright. At the trial Rolfe, B., ruled, in conformity with a late decision of the Court of Exchequer (in which this action was commenced), that a foreign author residing abroad, who composes a work abroad and sends it to this country, where it is first published under his authority, acquires no copyright therein, and could consequently convey no better right to a British subject by assignment than he had himself. To this ruling, a bill of exceptions was tendered, which was allowed by the Court of Exchequer Chamber in the present case, and a *venire de novo* in consequence awarded to the plaintiff.

The questions raised in it were, first, whether authors had at the common law a copyright in their works; next, supposing they had not, whether the statute applied to aliens at all; and further, if it did, whether its operation was extended to aliens resident abroad. There was another point as to the sufficiency *here* of an assignment made abroad between two foreigners, which would not have been sufficient to pass the copyright here, but which, being valid where it was made, was ruled to pass the interest effectually.

As for the first question, the court intimated that its decision was not essential to their determination of the present case. "If it were," said Lord Campbell, C.J., "we are strongly inclined to agree with Lord Mansfield, and a great majority of judges, who in *Millar v. Taylor* and *Bach v. Longman* declared themselves to be in favour of the common law right of authors;

“but,” continued he, “we rest our judgment on the statutes respecting literary property, which we think entitled the plaintiff to maintain this action.” Then his Lordship thus reviewed the general state of the law upon the whole case. “The Court of Exchequer in *Boosey v. Purday*, 4 Exch. Rep. 145, overruling the prior decision of that court, on the equity side, of *D’Almaine v. Boosey*, 1 Y. & C. 281, the decision of the Common Pleas in *Cocks v. Purday*, 5 C. B. 860, and the decision of the Queen’s Bench in *Boosey v. Donaldson*, 18 Law J. 174, authorities all directly in point; expressed an opinion that in such an action the right of the plaintiff must depend on the statute law of this country; that the laws of foreign nations had no extra-territorial power; that the plaintiff had no right at common law; and that the proper construction of the statutes of 8 Anne and of 54 Geo. III. c. 156, was, that a foreign author, residing abroad (or his assigns or their assigns) was not an author within their meaning, and could not have the benefit of those acts which were intended for the encouragement of British talent and industry, by giving to British authors a monopoly in their literary works, dating from the period of their first publication here. The learned judges of that court therefore held, that a foreigner, by sending to and first publishing his work in Great Britain, acquired no copyright. If these premises are sound, the inference from them is incontrovertible, that ‘a British subject who purchases from him such right as he had in his own country, which could not extend beyond it, cannot be in a better condition here than the foreigner.’ But with great deference,” added Lord Campbell, “to an opinion which must have been so strongly entertained, we see no sufficient reason for thinking that it was the intention of the legislature to exclude foreigners from the benefit of the statutes relating to literary property. *The British parliament has no power, and cannot be supposed to intend to legislate for aliens beyond the British territory; but for any thing within that territory, it has the power to legislate for aliens as well as natural born subjects, and as we conceive, by these general words, must be presumed to do so.* The monopoly which the statutes confer is to be enjoyed here, and the conditions which they require for enjoyment are to be performed here. What is there to rebut the presumption that aliens are entitled? The 8th Anne, c. 19, which the others follow, is intituled ‘An Act for the Encouragement of Learning,’ by vesting the copyright in printed books in authors and purchasers of such copies. Assuming the legislature intended this necessarily for the encouragement of learning in

“ Great Britain, without any general regard for the encouragement of it in others, may it not be highly for the encouragement of learning in this country that foreigners should be induced to send their works, composed abroad in English or foreign languages, to be first published in London?” Then his Lordship proceeded to deal further with the question so admirably, that we can do no better than quote largely from so luminous a judgment.

“ The question really is,” said he, “ whether a foreigner, by sending to and *first publishing* his work in Great Britain, acquires a copyright. Upon this entirely depends his power to transfer such right to a purchaser. It is freely admitted, that a foreigner domiciled in England, though neither naturalised nor made a denizen, if he composes a literary work here, may acquire a copyright in it; and the counsel for the defendant would not deny that if a foreigner being here for a temporary purpose, while here wrote a poem, he might publish it and acquire a copyright in it here. If he had composed it in his own country, and brought it over in his memory, reducing it into writing here for the first time, or if he had written it in his own country, and brought the manuscript with him, would it have made any difference as to his rights as an author? Can his personal presence within our realm be at all essential to his right as an author, if he does that by an agent, which it cannot be disputed he might do in his own proper person? The right which he has in England is the right of acquiring, under certain conditions, a monopoly in England for a certain number of years by the sale of his work; but this right, which is incorporeal and is in the nature of personal property, he carries with him wherever he is, and all that is to be done, fully to enjoy it, he can effectually do by another. Where then can be the necessity of crossing from Calais to Dover, before giving instructions for the publication of his work, and entering it at Stationers’ Hall? The law of England will protect his property and recognise all his rights, and give him redress for wrongs inflicted upon him within our territory, though he never set foot upon it. In the 6th of Henry VIII., the Common Pleas held that aliens residing in France might maintain an action of debt here, for, notwithstanding he is an alien, he shall receive protection in all personal actions if he be within this realm (and a friend), although it be otherwise with real actions, for no alien can have land within the realm unless he be a denizen.”—(Dyer, 2 b.) And if the alien had never been in the country, the court held that it would clearly make no difference, and among the instances

offered, an historic example might have been adduced, as Napoleon Bonaparte, when First Consul, brought an action for libel in our courts, although, from the Peace of Amiens not lasting, it never came to trial.

"For these reasons," continued his Lordship, "we think that if an alien residing in his own country were to compose a literary work there, and continued to reside there without having first published his work, nay more, should cause it to be first published in England in his own name and on his own account, he would be an author within the meaning of our statutes for the encouragement of learning, and he might maintain an action in our courts against any one who in this country should pirate his work. We wish to be understood as speaking of the rights of an author who *first publishes his work here*. I understand that in America and on the continent of Europe, when a literary work is once published, the author can only claim the copyright vested in him by law—by the law of the country, where he publishes; as to all others it becomes *publici juris*. This is the doctrine of our courts, and the legislature must be considered as having adopted and sanctioned it by the enactments of international copyright statutes."

Then the origin of the contrary doctrine was traced "to a dictum of the late V. C. Shadwell in *Guichard v. Mori* (9 Law Jour. 227, Chanc.) His Honor there observes, 'The circumstance that he was the owner of the seals will not justify the court in interfering, for he was a foreigner, and the court does not protect the copyright of a foreigner.' If that dictum went to the full extent that a foreigner residing abroad who did not publish his work could not acquire a copyright by publication in England, it would not be entitled to much weight, for it is merely thrown out *obiter*. The case had no connection with the law of copyright, the application being for an injunction to restrain the defendants from fraudulently using certain labels and seals alleged to have been used by the plaintiff in his business of a medicine vendor. Looking to the context, there is reason to believe that the Vice-Chancellor merely meant that the court does not protect the copyright of a foreigner *who has published his work abroad*; and we afterwards find that this must have been the reason, because in the subsequent case of *Bentley v. Forster* (10 Simons, 320), he expressly held the doctrine for which the plaintiff here contends. Seeing then if an alien friend wrote a book when abroad or in this country, and gave the British public the advantage of his industry and knowledge by first publishing his book here, he was entitled to the protection of the law relating to copyright in this country;

“ the only other case relied upon by the defendant was Page v. Townsend (5 Simons, 395); but this really has no application, for it turned on the construction of some acts of parliament passed for the protection of prints engraved, etched, drawn and designed *in England*. Then came Chappell v. Purday, in which the doctrine was first solemnly enunciated that a foreign author, residing abroad, who composes a work abroad, has not at common law or under the statutes any copyright in this country. But it was not necessary there for the court to affirm this doctrine, as there was really a good defence to the action, *on the ground that the musical composition in question had been published in Paris several months before it was published in England*. This doctrine against the rights of foreigners was very deliberately considered in Cocks v. Purday, where the contrary doctrine, which had been laid down by the Court of Exchequer in the time of Lord Abinger, was admitted and acted upon by the unanimous opinion of the judges of the Common Pleas. This decision, as I am informed by my colleagues of the Court of Queen’s Bench, was not only followed, but was fully considered and entirely approved of by Lord Denman and all his brethren. I may likewise mention, that in Ollendorf v. Black (20 Law Jour. 165), Knight Bruce, V. C., intimates a strong opinion in favour of the right of a foreign author who first publishes in England. We may perhaps, therefore, be justified in thinking the weight of authority is really in support of the doctrine on which our judgment is founded.”

It is to be regretted that the liberal and enlightened doctrine established by this solemn decision should have been since carped at by certain interested parties, but it is confidently submitted that it will neither be reversed upon appeal nor altered by a restrictive and narrow legislation.

COSTS—4 ANNE, c. 16, s. 5.

Partridge v. Gardner (in error), 20 Law Jour. Exch. 307.

In a recent note upon the case of Callander v. Howard (20 Law Jour. C. P. 66) the apparently very conflicting cases upon this section of the statute of Anne were compared, and as a result, the construction put upon it by that case (which professedly and in terms overruled Partridge v. Gardner, a modern decision of the Court of Exchequer, 4 Exch. 303) was adopted as most consonant to authority and common sense. Since then a writ of error has been brought in the case of Partridge v.

Gardner, on the strength probably of its having been disapproved of in *Callander v. Howard*, but unsuccessfully, as the judgment of the Court of Exchequer was affirmed. The decision in *Callander v. Howard* was not however impugned; but the difference which in our note was pointed out as existing by reason of the *declaration* in *Partridge v. Gardner* being *bad*, was held by the Court of Exchequer Chamber (some three weeks after the printing of that note) to suffice to distinguish the cases.

But even in this last case, in which the declaration was bad on general demurrer, Maule, J. in one place observes, "If the defendant had succeeded upon one issue in fact, and the plaintiff on the others, the plaintiff *would clearly be entitled to costs upon the issues found for him*;" while elsewhere he says, "suppose the issues are immaterial, can the plaintiff get the costs of them?" and "it may be said that all the issues become immaterial when the declaration is bad." This seems at first to involve a possible contradiction, as if one material issue of fact were found for a defendant, and fifteen other immaterial for the plaintiff, it would be puzzling to reconcile both dicta. It would seem, however, that at all events, in the case of issues rendered immaterial (as it were) by the insufficiency of the declaration, the former dictum must be taken with a corresponding limitation; and accordingly we find it expressly laid down by Lord Campbell, C. J., in delivering the judgment of the Court, that "the statute of Anne seems to proceed upon the supposition that there is good cause of action disclosed upon the declaration, and that if there is none, the plaintiff shall not have his costs." And this is exactly the view of Patteson, J., who said during the argument, "the statute of Anne seems to assume that, *but for the good plea on which the defendant succeeds*, the plaintiff would have recovered in the action."

COUNTY COURT APPEAL—IN WHAT CASES IT LIES.

Cawley v. Furnell, 20 Law Jour. C. P. 197.

East Anglian Railways Company v. Lythgoe, 20 Law Jour. C. P. 84.

THESE cases assume considerable importance from the small proportion which the cases in which parties to plaints in County Courts elect to have tried by a jury, bear to those in which they are content to leave them entirely to the decision of the judge. The point which in the latter case had occurred to Maule, J., as one of difficulty, was raised in the former, namely, whether an appeal lay at all from the decision of a judge of a County Court

when neither party had required a jury, and it had been left to the judge to decide on the facts and the law together, these moreover not being separated by any pleadings.

"The solution of that question," said Maule, J., "must depend upon the construction which is to be put on the 13 & 14 Vict. c. 61, s. 14, which provides that if either party in any cause 'of the amount to which jurisdiction is given to the County Courts by this act,' which is the case here, 'shall be dissatisfied with the determination or direction of the said court in point of law, such party may appeal from the same to any of the superior courts of common law at Westminster, two or more of the puisne judges whereof shall sit out of term as a court of appeal for that purpose.'" Thus the question became what was comprehended within the meaning of the words "determination or direction of the court in point of law;" and the opinion of the Court of Appeal was thus expressed:—"There is a determination in point of law when the court has nothing but law to determine, as when a question is raised upon demurrer or upon a special verdict, and though those proceedings do not exist in a County Court *eo nomine*, yet similar proceedings must take place in substance. For suppose a party were to make a claim which, on his own showing, was one which in point of law could not be sustained, as, for instance, if he made a claim for a sum of money as due to him upon a voluntary promise without consideration, and the opposite party were to object that such a claim could not be sustained in point of law; or, on the other hand, if the defendant, in answer to a claim for a debt, were to rely as a defence upon the fact that the cause of action did not accrue within three years, the determination of the court upon these questions would be a determination in point of law. The term 'direction' applies when the cause is tried by a jury, and the judge lays down to them a proposition as a matter of law, as, for instance, that a certain interest cannot pass except by instrument under seal;" and when this direction is such as to mislead the jury, who act upon it, it is called a misdirection, and it is a very common proceeding upon such ground of complaint being established, to obtain a new trial.

But in these cases, as observed by Maule, J., in the last cited of them, the complaint is not that the judge misdirected the jury, for there was none, but that "*he misdirected himself*;" and the court thus proceeds to show the difficulty of discriminating between the judge's self-direction (if we may be forgiven the word) in point of law, and his finding a disputed fact (which may be the hinge of the law point) in a

particular way: "Where the parties do not choose to separate the law from the facts at all, but leave the judge to determine both together, it may be very much doubted whether the parties do not exempt themselves from the words and spirit of this enactment. It is often very desirable that a decision should be without appeal. In the ordinary case of an arbitrator, who is to put an end to all controversies between the parties, it has long been settled that his decision on the facts or law cannot be impugned; and it may be that when the parties leave the facts and law to the judge, they may be considered as intending to put him in the situation of an arbitrator. It is objected that on such a construction the statute really gives no appeal. But the objection may be answered by using the words of the section in their reasonable import, and putting upon them the limited meaning, that the Court of Appeal should have before them a case in which the law and facts are separated." Then the judgment goes on to point out a rule for ascertaining whether the decision of a County Court judge upon law and facts mixed up together was wrong in point of law, and therefore open to an appeal, or mistaken in its view of facts, and consequently irreversible. "It may be, if it appears upon the case sent up to the Court of Appeal by the judge of the County Court, or agreed upon by the parties, that the decision of the judge can be sustained by a particular view of the facts which does not render it necessary to conclude that he has decided the particular point of the law in the way complained of as erroneous, that the Court of Appeal will have no power of reviewing the judgment; yet *when it is manifest from the facts of the case that the judge, in order to arrive at his judgment, must have decided a certain matter of law in a certain way, that that will be a determination in point of law, with respect to which an appeal will lie*; so that suppose there be a judgment that can be sustained consistently with the law by any view that may be taken of the facts stated, such a judgment can probably not be reversed; yet still, where the judge states the facts that were before him, and those facts can sustain his judgment upon one view of the law only, and that view be incorrect, the Court of Appeal may have jurisdiction to entertain an appeal against it."

Not only does this decision seem a right and sensible one, but, as remarked by the learned counsel for the appellants, the contrary view of the effect of the statute would render the benefit it purposes to confer nearly illusory.

COUNTY COURT ACTS—COSTS IN CASES OF CONCURRENT JURISDICTION.*Cross v. Seaman*, 20 Law Jour. C. P. 177.*Sharp v. Eveleigh*, 20 Law Jour. Exch. 282.

WHEN a plaintiff sues in one of the superior courts for an amount as to which they have concurrent or exclusive jurisdiction, but at the trial his claim is cut down to less than the lowest amount which would have given him his costs, had he sued for it alone, his right to costs may vary with the way in which his original demand has been reduced; if it be by payment, he loses his costs (*Turner v. Berry*, 20 Law Jour. Exch. 89); if by set-off, he is entitled to get them (*Woodhams v. Newman*, 7 Com. B. 654). So the first of the now cited cases decides that a reduction by tender does not affect a plaintiff's right to get his costs; moreover, as it very clearly shows the reason and principle of this difference, it is deserving of a short notice. After it had been observed by the court that it was in effect an action to recover the balance plus the sum tendered, Jervis, C.J., in his judgment, observes:—"If the plaintiff had abandoned all his claim but 20*l.* (the cause was not within the Extension Act), the defendant might have applied his tender to a portion of that amount." So he might a set-off, if he had one; but if the plaintiff was only going for a balance, and had expressed in his particulars the payments by which some larger sum had been reduced to such balance, then that balance would be in no risk of being a second time reduced by the same payments, and herein is the distinction.

In the other case the distinction is pointed out between the power of certifying for costs, which is given to the judge at *nisi prius* by the 12th section of the County Courts Extension Act, and that which is by the 13th section given to the court or a judge at chambers. A cause for which concurrent jurisdiction existed in the superior courts under the 9 & 10 Vict. c. 95, s. 128, was referred from *nisi prius* to an arbitrator, who was to have the same power of certifying as the judge at *nisi prius*, and who gave no certificate. Subsequently Parke, B., at chambers, certified that it was a case of concurrent jurisdiction, and this was a summons taken out before the same learned judge to review the former decision, on the ground that he had no jurisdiction to grant such certificate; and it was urged that the arbitrator had all the power of certifying transferred to him, and that as he had not exercised his power, the court, or a judge at chambers, ought not to interfere. Parke, B., however, thought

his decision clearly right, inasmuch as the powers of a judge at nisi prius, under the 12th section, which alone were given to the arbitrator, did not extend to certifying that the cause was one in which the superior courts had a concurrent jurisdiction, and that consequently the jurisdiction of the court, or a judge at chambers, so to do was not ousted.

In submissions and orders of reference, it will therefore in future be proper, where every thing is meant to be left to the arbitrator, to be careful to give him both powers of certifying.

Short Notes of New Books.

A History of the Law of Gavelkind and other remarkable Customs in the County of Kent. By Charles Sandys, F. S. A. Russell Smith, London.

This very elegantly got up book is perhaps even more interesting to the antiquarian than the lawyer, though both will find a fund of curious matter throwing light on the early manners, as well as usages and laws, of our Anglo-Saxon forefathers. We demur to some of the conclusions of the learned author, such as his doubt of the reputed origin of the division of England into counties and hundreds. But the facts related are derived from obviously careful research, and collated with infinite care, and a thorough knowledge of the subject. We wish Mr. Sandys would extend his inquiries and publication to other parts of the kingdom, in many of which he would find usages and customs, if not local laws, of Roman, Danish and early British origin, coupled, we suspect, with popular habits and idiosyncrasies of similar origin. A book of this title, combining ethnology with peculiar laws and local usages, would be a valuable addition to our present meagre information on the history of our early English times.

A Letter to Sir James Graham on Chancery Reform. By Edward Morton, Esq. Butterworths, London.

Having dwelt and dilated through nine pages on the evils arising from the imperfect manner in which evidence is now taken on issues on fact in the Courts of Chancery, Mr. Morton propounds this remedy:—

“I should say at once, TRANSFER THIS PART OF THE CHANCERY JURISDICTION, —TAKING THE EVIDENCE, AND DECIDING UPON THE ISSUES OF FACT,—TO THE COMMON LAW COURTS, which are peculiarly competent to perform such functions, where the bench and bar are conversant with the rules of evidence, and the practical application of them, and where alone the oral examination of witnesses can be conducted in such a way as to make it either convenient or conducive to the ends of justice.

“So soon as the cause is at issue, let the record be made up by a judge or officer of the court, and sent to a common law court appointed for the purpose; the issue would then be tried in the ordinary way before a jury, but with this important

difference,—no preliminary expense would be incurred in taking the evidence in writing, the witnesses would be called at once into open court, put into the box, examined and cross-examined, and the truth extracted from them, by the most certain of all processes; and after the trial let the findings of the jury upon the issues, and the evidence itself, be returned to the Court of Chancery, that court having then to perform its peculiar functions, i. e. to apply the principles of equity to the facts so found.

"Is there anything very startling, or even very novel in principle, in this proposition?"

Nothing novel certainly, or startling either, but simply needless. The County Courts Bill, to be re-introduced by Lord Brougham, provides the easiest and least obdurate way of doing this. Suitors, who agree with Mr. Morton in his estimate of the value of juries, can then have them at their option,—an option they avail themselves of in about one case in 5000.

Mr. Morton objects to giving the County Courts equity jurisdiction; but he overlooks the fact that his own scheme keeps the equity jurisdiction in the Equity Courts, who are, he says, "to apply the principles of equity to the facts so found." He forgets, in his low estimate of the powers of County Court judges, that, inasmuch as they are taking evidence of facts nearly every day in their lives, they become very much better judges of it than any other judges in the land, having twenty times the same practice. A much less considerate plan we have seldom seen breached. Mr. Morton seems wholly ignorant of what the County Courts are, which he persists in calling Small Debt Courts, unaware that they try causes *without limitation* of damages where the parties consent, and, where they do not, up to 50*l*. The immense amount of heavy business and important causes now voluntarily brought into them stands in somewhat amusing contrast with Mr. Morton's *ipse dixit* :—

"I say that in cases involving any higher questions than—'Do you owe this?—How do you mean to pay it?'—the County Courts are not such satisfactory tribunals as the Courts of Westminster Hall!!!"

Where questions arise then of consideration for a promise or contract, of actual delivery or acceptance of goods, of requisite stamp on written instruments, &c. &c., and in all the myriad of issues raised by the facts in commercial transactions,—where sums, say, of ten, twenty or thirty or fifty shillings are at stake,—it is Mr. Morton's deliberate conviction that an action at law, decided in six months, in which the costs would be moderate perhaps at 50*l*., would be more "*satisfactory*" than the prompt decision of the County Court judge, with costs little more than nominal; and this Mr. Morton propounds, in a letter addressed to one of the acutest minds and most able statesmen of the day, as one of the main arguments (?) whereby he seeks to recommend his suggestions!

Events of the Quarter.

MISCELLANEOUS.

WE believe it is in contemplation to propose that the circuits of the judges be made four times in each year, one judge only performing the circuit and sitting simultaneously with the Quarter Sessions.

THE LAW OF PARTNERSHIP.—A Parliamentary blue book has been printed, containing the Report of the Select Committee of the House of Commons on the Law of Partnership. The committee are of opinion that the law of partnership, as at present existing, viewing its importance in reference to the commercial character and rapid increase of the population and property of the country, requires careful and immediate revision. The committee state: "By the existing law no person can advance any capital to any undertaking, public or private, in the profits of which he is to participate, nor become partner or shareholder in any enterprise for profit, without becoming liable to the whole amount of his fortune, as expressed by a great legal authority, to his last shilling and his last acre." The evidence printed forms a goodly-sized volume; and the actual matter might be usefully condensed into a fifty-paged pamphlet: and the recommendation and result in as many lines. A Bill we hear is in preparation, which is to be introduced at the beginning of the Session, and most probably smothered at the end of it.

THE ROLLS COURT.—The "Globe" says, that since Sir John Romilly took his seat on the Rolls Court, on the 15th April last, he has cleared off every portion of the business of the court. He has disposed of 90 causes and rehearing, 101 further directions, pleas, demurrers and exceptions, 25 claims, 3 special cases, 160 petitions, besides short causes and consent petitions. Judgment has been given in every instance with a single exception, in which it was thought that by delaying a decision the parties may be brought to an amicable arrangement.

THE WOODS AND FORESTS AND PUBLIC BUILDINGS.—On the 18th of October, the act separating the management of the Woods and Forests from the direction of Public Works and Buildings came into force. The First Commissioner of the Woods becomes the First Commissioner of Public Works and Buildings, at a salary of 2000*l*.

a year, and a Surveyor-General is appointed at a salary of 1500*l.* a year. The Surveyor-General is to have all the duties and powers of the Commissioners of the Woods and Forests.

ST. ALBAN'S BRIBERY COMMISSION.—The commissioners appointed in the last Session of Parliament to inquire into the manner in which the elections for the borough of St. Alban's have been conducted, with a view to arrive at the extent to which bribery and other corrupt practices have prevailed, commenced their sittings on the 27th ult. The court is not an open one, although it was originally intended by the commissioners that it should be. The ground alleged for hearing the evidence with closed doors is the usual one, that the commissioners believe the publication of the evidence would defeat the object the House of Commons had in view when the commission was proposed. A very large number of witnesses are being examined.

CAUSES AT THE LAST SPRING ASSIZES.—Among the papers lately printed, by order of the House of Lords, was one giving an account of the number of causes tried on all the circuits of England and Wales at the Spring and Summer Assizes for the last seven years, and also an account for the last Spring Assizes:—On the Home Circuit, it appears that there were on the last Spring Assizes, 111 causes; on the Midland Circuit, 41; on the Norfolk Circuit, 14; on the Northern Circuit, 75; on the Oxford Circuit, 63; on the Western Circuit, 53; and on the North Wales and Chester Circuit, 19—Total, 376. On the last Summer Assizes the business was further diminished.

DIMINUTION OF PAUPERISM.—A return to the House of Commons shows that on the 1st of July, 1850, there were 831,780 paupers in the receipt of relief, and on the 1st of July last 813,089, showing a decrease of 18,691. Of able-bodied paupers the decrease in the same period was 7,903.

COURT OF CHANCERY.—A return relative to the amount of cash and stock standing to different accounts in the Accountant-General's name, and not dealt with during a period of fifty years prior to the 1st of August, 1850, shows that the number of cash accounts so standing is 3,251, and amount to 247,495*l.* 5*s.* 10*d.*; those for stock are 762 in number, and amount to 314,543*l.* 19*s.* 3*d.*

BARON PLATT.—At the recent assizes at Liverpool a stabbing case from Manchester was heard before Baron Platt, who, in summing up to the jury, used these words:—"One of the witnesses tells you that he said to the prisoner, 'If you use your knife you are a damned coward;' I say also (continued the learned judge, apparently in deep thought) that he was a damned coward, and any man is a damned coward who will use a knife."—*Manchester Courier.*

MR. ALDERMAN SALOMONS, M.P., AND THE VIOLATED RULES OF THE HOUSE OF COMMONS.—On the 11th instant Mr. Alderman

Salomons's solicitor received "notice of trial" in two separate actions, which will bring the question of the admission of Jews into parliament before the Court of Queen's Bench in the course of a few weeks. The notices of trial are for the sittings after Michaelmas Term; consequently the cases will come on early in December, as the term ends on the 25th of November. The actions are brought for "having voted in the House of Commons without having first taken the oaths required by law."

This is as it should be; the issue cannot be very doubtful.

MR. RAMSHAY.—An inquiry into the case of this judge will take place at Preston, on the 5th November, by the Earl of Carlisle.

APPOINTMENTS, CALLS, &c.

The Queen has been pleased to direct letters-patent to be passed under the Great Seal of the united kingdom appointing the Right Hon. Sir James Lewis Knight Bruce, and the Right Hon. Robert Monsey Lord Cranworth, to be judges of the Court of Appeal in Chancery.

Mr. Kindersley, Master in Chancery, and Mr. James Parker, Q. C., are appointed Vice-Chancellors.

There never has been any intention of conferring a peerage on Sir J. L. K. Bruce.

The office of Professor of English Law in the Queen's College, Cork, has been conferred upon Mr. O'Donnell. This gentleman is the son of a Fellow of Trinity College, who was married to the daughter of the late Mr. Denis Creagh Moylan, of that city.

OBITUARY.

On the 9th October, Charles Frith, Esq., of Park Village West, Regent's Park, and the Inner Temple, Barrister-at-law, at Dover. Mr. Frith was called to the Bar in June, 1847, and practised as a conveyancer and equity draftsman.

On October 12th, by his own act, Richard Ellison, Esq., Solicitor, and chief resident of Tickhill, Yorkshire. During the previous week the unfortunate gentleman had been labouring under deep depression of mind, which at length assumed such an appearance that it was deemed necessary to place a watch on his movements. On Sunday morning, after taking exercise for some time, he contrived to elude his watchers' vigilance, and returned to the house unnoticed and alone. The unfortunate gentleman appears to have gone direct to his room, and there cut his throat. A gloom

has been cast over the neighbourhood by this untoward event, as the deceased (who was the eldest son of John Ellison, Esq., estate steward to the Earl of Scarborough) was highly esteemed for his kindness and generosity to the neighbouring poor.

On the 14th October, Armorer Donkin, Esq., for many years an eminent solicitor in Newcastle-upon-Tyne, and an alderman of the corporation, at Jesmond, aged 72.

GRAY'S INN.

The Lectures on Law will be resumed in the Hall of this Society, by the Lecturer, Mr. W. D. Lewis, in the ensuing Michaelmas Term, commencing on Monday, the 3rd of November, at half-past seven o'clock, when an Introductory Lecture will be delivered on "The general Advantages of a Study of the English Statute Law." This will be followed by a course of Lectures on the Statutes relating to Property on every Monday and Thursday Evening. The "Mootings" of the Students will take place on every alternate Thursday evening, after the Lecture. Tickets of admission may be had by any Member of an Inn of Court, on application at the Steward's Office.

Correspondence.

THE NEW YORK IDEA.

To the Editor of the Law Magazine.

Sir,

I HAVE read the speculations on law reform, which have lately appeared in the *Law Magazine* and other publications, with much interest, and, with great deference to the *Times*, to Lord Brougham, the Law Amendment Society, and Mr. Dudley Field, I would respectfully suggest that the law of England is capable of being sufficiently reformed and improved by the enlightenment of her own spirit and genius, and without reference to the peculiarities of any foreign system. Fully admitting the great attainments and professional merits of the American lawyers, I cannot, after all the fuss and talk we have had, see what we have gained or are likely to gain by running to New York in search of ideas for legal change. As to the union of law and equity we can discuss that question among ourselves and in our own way; and if we want any information on the subject, which we cannot find at home, our neighbours and fellow countrymen the Scotch can tell us all about it. It appears that this united jurisdiction, the flourish about which by Mr. Dudley Field before the surprised gaze of the Law Amendment Society has so unaccountably stirred us all, has actually, without our knowing it, been the practice of the Courts of Scotland for upwards of 300 years, and is at this moment in full vigour there! On the subject of law and equity therefore we need no advice from the recent inspiration of the New York Bar. And with regard to pleading and legal procedure allow me space for an extract from a short treatise by the late Mr. Justice Story, on which it might be well for some of our new-light jurists to reflect; and when they have done so, perhaps they may be of opinion that American experience of English pleading is hardly a fair criterion of its juridical character. In his "Discourse on the Past History, Present State, and Future Prospects of the Law," this very learned and able American judge thus candidly expresses himself (pp. 42, 44):

"In looking to the future prospects of the jurisprudence of our country, it appears to me that the principal improvements must arise from a more thorough and deep laid juridical education, a more exact preparatory discipline, and a more methodical and extensive range of studies.

"In the first place it cannot be disguised that we are far behind the English Bar in our knowledge of the practice, and of the elementary forms and doctrines of special pleading. I do not speak here of the technical refinements of the old law in special pleading, which the good sense of modern times has suppressed; but of those general principles which constitute the foundation of actions, and of those forms by which alone rights and remedies are successfully pursued. There is a looseness and inartificial structure in our declarations, and other pleadings, which betray an imperfect knowledge both of principles and forms; an aberration from settled and technical phraseology, and a neglect of appropriate averments, which not only deprive our pleadings of just pretensions to elegance and symmetry, but subject them to the coarser imputation of

"slovenliness. The forms of pleading are not, as some may rashly suppose, "mere trivial forms; they not unfrequently involve the essence of the defence; "and the discipline which is acquired by a minute attention to their structure is "so far from being lost labour, that it probably, more than all other employ- "ments, leads the student to that close and systematical logic, by which success in "the profession is almost always secured. Of the great lawyers and judges of "the English forum, one can scarcely be named who was not distinguished by "uncommon depth of learning in this branch of the law, and many have risen "to celebrity solely by their attainments in it. We should blush to be accused "of perpetual mistakes in grammatical construction, or of a gross and unclas- "sical style of composition. Yet these are venial errors compared with those "with which the law is sometimes reproached. Diffuse and tedious as are the "modern English pleadings, it cannot be denied that they exhibit a thorough "mastery of the science. We miss, indeed, the close, lucid and concentrated "rigour of the pleadings in the days of Rastall, and Coke, and Plowden, and "even of Saunders and Raymond. But our taste is not offended by loose and "careless phraseology, or our understanding by omissions, which betray the "genuine "crassa negligentia" of the law, or by surplusage so vicious and "irrelevant, that we are at a loss to know at what point the pleadings aim, or "whether they aim at any. We ought not to rest satisfied with mediocrity when "excellence is within our reach. The time is agreed when gentlemen should be "scrupulously precise in their drafts of pleadings, and when the records of our "courts should not be deformed by proceedings which could not stand the most "rigorous scrutiny of the common law in form as well as in substance. Ex- "emplifications of our judgments may pass, nay, do already pass, to England, "and it ought to be our pride to know that they will not be disgraced under the "inspection of the sober benchers of any Inn of Court. We should study "ancient forms and cases, as we study the old English writers in general "literature; because we may extract from them not only solid sense, but the "best examples of pure and undefiled language. There is a better reason still, "and that is, that special pleading contains the quintessence of the law, and no "man ever mastered it who was not, by that very means, made a profound "lawyer."

This hardly needs comment. But I may be allowed to say, that, on the testimony of Judge Story, it almost looks as if this much-be- praised New York movement had been the desperate resource of men who had been unable to acquire and apply a knowledge of the system which the Code professes to supersede. Be that as it may, we ought not, from a mean fear of the County Courts, proceed too quickly in our course of legal revolution; and beyond all doubt a vulgarity, ignorance, and contemptible popular liberalism, have been introduced into the public discussion of legal topics, that is not more degrading to jurisprudence than it is disgraceful to those professional men who forget their high calling by lending themselves to it. They would make a science a trade. Wishing all success to the cause of sound law reform,

I have the honour to be, Sir,

Your most obedient Servant,

25th September, 1851.

AMICUS CURIAE.

J. H. E.'s communication has been received, too late however to meet with attention in the present Number.

List of New Publications.

Archbold.—The New Rules and Forms of the County Courts, regulating the Practice and Proceedings; with Notes and Forms. By J. F. Archbold, Esq., Barrister. 12mo. 4s. boards.

Ayrton.—A Letter addressed to those interested in the Question of Reforming some Branches of the Law. By W. S. Ayrton, Esq., Commissioner in Bankruptcy. 8vo. 6d. sewed.

Collier.—A Letter, on the Reform of the Superior Courts of Common Law, to the Right Hon. Lord John Russell. By R. P. Collier, Esq., Barrister. 8vo. 1s. sewed.

Coode.—Report of George Coode, Esq. to the Poor Law Board, on the Law of Settlement and the Removal of the Poor, 1851. 8vo. 4s. cloth.

Cox.—The Law of Evidence Amendment Act, 1851, with Introduction, Notes and Index. By E. W. Cox, Esq., Barrister. In royal 8vo. 2s. 6d. sewed. In 8vo. 1s. 6d. sewed.

Fry.—The Poor Law Acts of 1851, viz. 14 Vict. c. 11, 14 & 15 Vict. cc. 28, 34, 39, 47, 105, with Introduction, Notes, and a full Index. By D. P. Fry, Esq., Barrister. 12mo. 2s. 6d. boards.

Glen.—The Acts relating to the Relief of the Poor, passed in the Session 1851; together with the Common Lodging Houses Act, with Notes and Appendix. By W. C. Glen, Esq. 12mo. 2s. 6d. boards.

Greaves.—Lord Campbell's Act for the Improving the Administration of Criminal Justice; with Notes, Observations, &c. By C. S. Greaves, Esq., Q.C. Royal 8vo. 7s. boards.

Harle.—An Argument on the Inutility of the Distinction between Barrister and Attorney, addressed to the Lord Chancellor. By W. L. Harle, Attorney at Law. 8vo. 1s. sewed.

Hazlitt.—The Registration of Deeds in England; its Past Progress and Present Position; with an Analysis of Lord Campbell's Bill for the Registration of Assurances, now before Parliament. By W. Hazlitt. 8vo. 1s. sewed.

Hemings.—The Equity Statutes of 1851: being an Analysis of, and Observations on, the Chancery Court of Appeal Act, and the Law of Evidence Act. By W. Hemings, Esq., Barrister. 12mo. 4s. boards.

Levi.—Commercial Law, its Principles and Administration, or the Mercantile Law of Great Britain compared with the other Countries of Europe, &c. By L. Levi. Part III. Imperial 4to. 1l. 10s. cloth.

Morton.—A Letter to the Right Hon. Sir James Graham, M. P., one of the Chancery Commissioners, suggesting a Solution of the Great Problem of Chancery Reform, viz. the Mode of taking Evidence on Issues of Fact, by the Establishment of an Issue Court; with some Remarks on the Appointment of Short Hand Writers to the Courts. By Edward Morton, Esq. 8vo. 1s. sewed.

Norman—The Law and Practice of Copyright, Registration, and Provisional Registration of Designs and Sculpture, with Practical Directions, Remedies, &c., in cases of Piracy; with an Appendix of Statutes, and a Table of Fees, &c. By J. P. Norman, Esq., Barrister. 12mo. 4s. 6d. cloth.

Observations on the Proposed Registration of Deeds, with reference more particularly to the Pamphlet of William Hazlitt, Esq. By a Country Solicitor. 8vo. 1s. sewed.

Pearce—The New Law of Indictments: comprising Lord Campbell's Administration of Criminal Justice Improvement Acts, &c., with Introductory Observations on the Law of Criminal Pleading, and Practical Notes and Forms adapted to these Statutes. (Intended as a Supplement to Archbold's Criminal Pleading and Evidence.) By R. R. Pearce, Esq., Barrister. Royal 12mo. 8s. 6d. sewed.

Pollock—The Practice of the County Courts, in Six Parts; with the Decisions of the Superior Courts, and Tables of Fees; also an Appendix, containing all the Statutes, List of the Court Towns, Districts and Parishes, and the Rules of Practice and Forms, By C. E. Pollock, Esq., Barrister. Royal 12mo. 15s. cloth.

Story—Commentaries on the Constitution of the United States; with a preliminary Review of the Constitutional History of the Colonies and States before the adoption of the Constitution. By Joseph Story. 2 vols. royal 8vo. 2l. 10s. bound. (Boston, U. S.)

Symons—The Law relating to Merchant Seamen, arranged chiefly for the use of Masters and Officers in the British Service. By E. W. Symons. Fifth Edition. 12mo. 5s. cloth.

Tapping—A Treatise on the High Peak Mineral Customs and Mineral Courts Act, 1851, analytically and practically arranged; with Notes, References, and a copious Index. By T. Tapping, Esq., Barrister. 12mo. 5s. boards.

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Wharton—The Principles of Conveyancing, including Dissertations, with Copyhold Forms and Precedents, and a copious Index. By J. J. S. Wharton, Esq. Barrister. 8vo. 21s. cloth.

Wilmot—A Digest of the Law of Burglary. By Sir J. E. Eardley Wilmot, Bart., Barrister at Law. Royal 12mo. 10s. boards.

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A DIGEST
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OF
LAW AND EQUITY,
AND IN THE
ADMIRALTY, ECCLESIASTICAL AND BANKRUPTCY
Courts,
CONTAINED IN THE STANDARD REPORTS.

LAW MAGAZINE, VOL. XV., N. S., AUG. & NOV. 1851.

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COMMON LAW.

Comprising the Common Law Cases (not previously inserted) in the following Reports :—

13 Queen's Bench Reports, part 1.	2 Crown Cases, parts 1 and 2.
15 Queen's Bench Reports, part 1.	5 Exchequer Reports, parts 1 and 2.
8 Common Bench, part 3.	20 Law Journal (N.S.), parts 5, 6 and 7.

ACTION FOR RAILWAY CALLS.—In an action for railway calls the plaintiff proved that it was the course of business for C., a clerk, to fill up printed notices of the calls and direct them to the shareholders, and then to put the notices into a basket; and it was the practice for another clerk to post the letters which were in the basket, which he had done on this occasion. C. was dead, but a list of shareholders containing the name of the defendant was produced in his handwriting, and indorsed by him "Letters sent out." C. had received instructions to make out such list, and had been seen filling up and directing the notices with such a list before him: Held, that the list so indorsed was admissible as evidence that notice of the call had been sent to the defendant, notwithstanding it was not distinctly shown when the indorsement was made. *Eastern Union Railway Company v. Symonds*, 5 Exch. 237.

AMENDMENT.—An affidavit for a distringas to outlawry, stating that the answers to the attempts made to serve the defendant with the writ of summons at his last known residence here, where the defendant is abroad; that all reasonable means and diligence have been ineffectually used to serve the defendant personally, and that the deponent believes the defendant keeps out of the way to avoid service, is sufficient; a less degree of particularity being required on such an application than on moving for a distringas to compel appearance. In proceeding to outlawry by writ of summons and distringas, the first *exigi facias* is properly tested on the day on which the distringas is returned. A judge's order for a distringas was made and dated on the 12th of October, upon a defective affidavit; the affidavit was amended and resworn on the 13th, and the order was then delivered out as of the 12th. Upon a motion to rescind the order, and subse-

quent proceedings thereon, the court allowed the date to be altered to the 13th, upon payment by the plaintiff of the costs of the amendment, and of the application to rescind the order. *Dick v. Beavan*, 8 C. B. 621.

ANNUITY.—Apportionment.—By the 1 & 2 Will. 4, c. 11, King William the Fourth was empowered, by indenture, to grant to the Queen an annuity of 100,000*l.*, to commence from the death of the King, and to be paid out of the Consolidated Fund. By indenture, dated the 6th of April, 1832, in pursuance of this act, the King granted to trustees, in trust for her Majesty, the annuity of 100,000*l.*, and directed that it should be paid at the receipt of the Exchequer, and that the auditor of the Exchequer should issue debentures for paying the same, and that the Commissioners of the Treasury should cause the said sum of 100,000*l.* to be paid out of the Consolidated Fund. By the 4 & 5 Will. 4, c. 15, the office of auditor of the Exchequer is abolished, and in all cases of grants by Parliament charged on the Consolidated Fund, instead of debentures being issued by the auditor, the Commissioners of the Treasury are required to issue warrants for the payment of the monies granted: Held, that a mandamus would lie to the Lords of the Treasury to issue such a warrant. The annuity to the Queen was, by the act of parliament and the indenture granting it, to commence and take effect immediately after the decease of his majesty, and to continue from thenceforth for and during the natural life of her majesty, and to be paid and payable at the four most usual days of payment, viz., the 31st of March, the 30th of June, the 30th of September, and the 31st of December, by even and equal portions, the first payment to be made on such of the said days as should first and next happen after the decease of his majesty. King William the Fourth died on the 25th of June, 1837, and upon the 30th of the same month a full quarter's annuity was paid to the Queen Dowager. The Queen Dowager died on the 2nd of December, 1849: Held, that no apportionment of the quarter's annuity which would have been due on the 31st of December could be made in her favour: Held, also, that the fact of a whole quarter's annuity having been paid on the 30th of June, 1837, would not have prevented a mandamus being issued to compel payment of a proportionate part of the last quarter up to the day of her death, if the annuity had been apportionable. The same act of parliament and indenture settled upon the Queen Dowager Marlborough House during her life, and limited an interest therein to her executors for a year after her death, and the indenture (to which the Queen was a party) expressed that the annuity was in lieu of dower: Held, that these circumstances did not show that the annuity was apportionable. *Reg. v. Lords of the Treasury (In re Queen Dowager's Annuity)*, 20 Law J. (N. S.) Q. B. 305.

APPEARANCE OF COUNSEL IN CAUSE WITHOUT INSTRUCTIONS FROM AN ATTORNEY.—There is no rule of law requiring that counsel appearing in Court for a party who pleads in person, should be instructed by an attorney. Therefore,

where a judge *ad nisi prius* had ruled that counsel appearing for such party, and not instructed by an attorney, could not cross-examine or address the jury, the court granted a new trial. But the usage which has prevailed at the bar, that counsel, unless in some excepted cases, should take their instructions from attorneys only, is beneficial, and ought to be maintained. *Doe d. Bennett v. Hale*, 15 Q. B. 171.

APPROPRIATION.—*Larceny.*—A. employed by B., a tailor, to sell clothes for him about the country, was entrusted with a parcel of clothes on the following terms:—B. fixed the price of each article, and A. was to sell each at that price, and to bring back the money and any unsold clothes to B., and he was to have three shillings in the pound for his trouble. A. pawns some of them, and fraudulently appropriates the rest: Held, that such appropriation was larceny. *Reg. v. Poyser*, 2 Cr. Cas. 233.

ARBITRATION.—1. *Appointment of umpire by lot.*—An agent appointed to represent a party on a reference to arbitration, and to conduct the reference on his behalf, though not an attorney, has authority to bind his principal by waiving an objection to an improper appointment of an umpire by lot. *Backhouse v. Taylor*, 20 L. J. (N. S.) Q. B. 233.

2. *Award—Attachment—Delay in applying to court.*—An award made in an action, in which A. and B. were plaintiffs and C. defendant, ordered that the defendant should pay the plaintiffs a certain sum of money, and directed that the defendant should pay the costs of the reference and award (not saying to whom the costs were to be paid). After more than two years from the making of the award, one of the plaintiffs demanded payment of the award from the defendant. The defendant did not pay: Held, that the plaintiffs were entitled to an attachment to compel payment, although the plaintiffs had given no explanation of the delay in coming to the court: Held, also, that the direction in the award as to the costs was sufficiently certain, as the award could not reasonably be construed to mean that the defendant should pay costs to any one but the plaintiffs: Held, further, that the demand made by one only of the two plaintiffs was a sufficient demand to bring the defendant into contempt. *Baily v. Curling*, 20 Law J. (N. S.) Q. B. 235.

ARBITRATOR.—*Discretionary power over costs of award.*—If a submission to reference by agreement, containing a clause for making it a rule of court, provide that the costs of the reference and award shall be in the discretion of the arbitrator, who may award and direct by and to whom the same shall be paid, the arbitrator cannot by his award conclusively fix the amount of the costs of the award. If in the award he name an exorbitant sum as costs of the award, and a party to the reference is obliged to pay such sum to obtain possession of the award, such party may recover the excess beyond what a jury may deem a reasonable compensation to the arbitrator in an action against the arbitrator for money had and received to his use. *Hernley v. Branson*, 20 Law J. (N. S.) Q. B. 178.

ARREST UNDER CIVIL PROCESS.—*Privilege morando et redeundo.*—A person acquitted on a criminal charge is not entitled to privilege from arrest under civil process morando aut redeundo. Where, therefore, the defendant in a civil action, immediately after his acquittal and discharge on a trial for a charge of embezzlement at the quarter sessions, and whilst he remained in the court, was arrested under a writ of *capias* in the action, this court refused to discharge him out of custody. *Hare v. Hyde*, 20 Law J. (N. S.) Q. B. 185.

ASSAULT.—1. *By servant—Corporation aggregate—Ratification.*—If a servant of a corporation aggregate commit an assault by the authority of the corporation, an action of trespass for assault and battery may be maintained against the corporation. It is not necessary that the servant should be authorized to do the act by instrument under the seal of the corporation. If an assault be committed on behalf and for the benefit of a corporation aggregate, the corporate may ratify the act of the agent, and if they do so they render themselves liable to an action of trespass for the assault. If a servant of a railway company, acting on behalf of the company, assault and imprison a passenger to compel him to pay his fare for riding in the carriage of the company, the act of the servant is one which may be for the benefit of the company and may be ratified by them. *Eastern Counties Railway Company v. Broome*, 20 Law J. (N. S.) Exch. 196.

2. *Conviction of.*—A. was indicted for feloniously assaulting B., putting him in fear and danger of his life, feloniously and violently stealing from his person, and before, at and after such robbery feloniously beating him, against the form of the statute and against the peace. Verdict, guilty of assaulting and beating with intent to rob: Held, that the above finding would not warrant a conviction of assault either at common law or under the stat. 7 & 8 Will. 4 & 1 Vict. c. 85, s. 11, and that the judgment must be arrested. *Reg. v. Reid*, 2 Cr. Cas. 88.

ASSUMPSIT.—*Good consideration—Averment of performance.*—A declaration in assumpsit, after stating that before and at the time of the making of the promise thereafter mentioned, an action on the case and an action of trespass at the suit of the plaintiffs against the defendant were pending in the Court of Queen's Bench, alleged that it was agreed between the plaintiffs and the defendants that the said actions should be settled and all proceedings therein stayed, and that the defendant should pay to the plaintiffs 40*l.* in respect of the costs of the said actions and 23*6l.* 9*s.* in part of damages, and the plaintiffs should receive from certain persons named the sum of 263*l.* 11*s.*; or in case of their default, then that the defendant should make good that sum also, in which case the defendant was to be entitled to do certain other things stated; that although the plaintiffs had always performed the said agreement on their part, and confiding in the said promise of the defendant did, upon the making of the

same, wholly cease to prosecute the said actions and each of them, and had thence continually hitherto stayed all proceedings therein; and although a reasonable time for the defendant to pay the said sums of 40*l.* and 236*l.* 9*s.* had elapsed before the commencement of the suit, yet, &c.: Held, on a motion in arrest of judgment, that there appeared a good consideration to support the defendant's promise, and that performance on the part of the plaintiffs was sufficiently averred. *Crowther v. Farrar*, 20 Law J. (N. S.) Q. B. 298.

ATTORNEY'S BILL.—1. *Charging Railway Company.*—The defendant was a member of the provisional committee of the Northampton, Lincoln and Hull Railway Company. The plaintiff, an attorney, who had been employed by the Company, delivered his bill of charges, headed "Northampton, Lincoln and Hull Railway, to R. H. Daubney, debtor:" Held, that it sufficiently charged the defendant within the meaning of the stat. 6 & 7 Vict. c. 73, s. 33. It is not sufficient delivery of a bill of costs, within the statute, for the attorney to show it to the party charged, and then to take it away again, unless the attorney showing it intends to leave it with the party, and merely takes it back at his request. *Phipps v. Daubney*, 20 Law J. (N. S.) Q. B. 273.

2. *Taxation of—Question reserved—Liability of client to pay costs of taxation.*—A judge's order, referring an attorney's bill to taxation, reserved to the client the right of disputing his liability to the whole or any part of it, on certain specified grounds. The order did not contain any direction to the master to tax the costs of the reference, as required by the statute 6 & 7 Vict. c. 73, s. 37. The master taxed off less than a sixth of the whole bill, and taxed the attorney the costs of the reference: Held, that the client was liable to pay the costs of the taxation, whatever might be the event of the questions reserved. *Shaw, In re*, 20 Law J. (N. S.) Q. B. 280.

AUCTIONEER.—*Licence—Revocation.*—An auctioneer, employed to sell goods on the premises of the proprietor, has not such an interest in the goods as will make a licence to enter on the premises irrevocable. A parol agreement, by which a person is authorized to enter on premises, cannot make the licence to enter irrevocable. *Taplin v. Florence*, 20 Law J. (N. S.) C. B. 137.

BANKRUPT.—1. 12 & 13 Vict. c. 106, ss. 256, 257—*Certificate to found execution—Refusal of certificate of conformity.*—When the Court of Bankruptcy has refused to grant a certificate of conformity on the ground that the bankrupt has committed any of the offences enumerated in section 256 of statute 12 & 13 Vict. c. 106, the granting of a certificate to the assignees or a creditor upon which a writ of execution may be issued against the body of the bankrupt, in pursuance of section 257, is a ministerial act, and being for the purpose of enforcing payment of the bankrupt's debts it may be granted from time to time upon the application of the assignees or creditors. This court has no power to inquire into the grounds upon which a certificate of conformity was refused by the Court of Bankruptcy. *Congill, In re*, 20 Law J. (N. S.) Q. B. 300.

2. *Debt passing to assignees—Personal labour.*—To a declaration containing counts for work and labour as a surgeon and apothecary, and for goods sold and delivered, the defendant pleaded that before the accruing of the causes of action the plaintiff became bankrupt, and that his assignees claimed the debt from the defendant. The plaintiff replied that the labour was his own personal labour bestowed after the bankruptcy, and done for the present necessary support of himself and his family, and that the goods sold were medicines purchased out of the proceeds of other personal labour, and increased in value by the plaintiff's personal labour and supplied by the plaintiff for the present necessary support of himself and his family and as a part of, and incidental and necessary to, his personal labour. The rejoinder traversed these allegations. It was proved that the plaintiff, a general medical practitioner, was an uncertificated bankrupt, and by an arrangement with a friend who had purchased his stock of medicines, that he had continued in possession of them, and had carried on his business as before, and had also purchased fresh drugs upon credit. The debt in question was contracted by the plaintiff attending the defendant and furnishing medicines compounded by him out of drugs: Held, that the replication was not proved, as this was not merely a demand for personal labour, but that the plaintiff was in substance carrying on his business for profit. *Elliot v. Clayton*, 20 Law J. (N. S.) Q. B. 217.

BANKRUPTCY.—1. *Costs in—Taxation.*—A writ of summons having issued against the defendant, a summons in bankruptcy was afterwards taken out against him, returnable on the 17th, on which day an order was made by the commissioners, pursuant to the 12 & 13 Vict. c. 85, that the costs of the summons should abide the event of the action. On the 15th of October a summons was taken out before a judge, returnable on the 17th, for staying proceedings on payment of the debt and costs, and an order for that purpose was made on the 18th. One bill having been taxed in bankruptcy, and the other in this court, the master added them together, and judgment was signed for the amount: Held, that the judgment was regular. *Webb v. Hewlett*, 20 Law J. (N. S.) Exch. 134.

2. *Fraudulent preference.*—The effect of a bankruptcy upon a transfer of goods amounting to a fraudulent preference, is not to vest the goods at once by the bankruptcy in the assignees, without any election on their part other than their acceptance of the office of assignee; but such transfer vests the property in the transferee, subject to be divested by the assignees at their election, and gives the transferee a perfect title except so far as it is avoided by the assignees. Therefore, where a transfer had been made before the bankruptcy, and the transferee, after the appointment of assignees, had brought an action for an excessive distress upon the goods, made shortly before the bankruptcy, and the jury found that the transfer to the plaintiff was a fraudulent preference, but the assignees had not taken any step to affect the plaintiff's title, it was held that the defendant could not set up the title of the assignees against the plaintiff's right

to recover. *Leake v. Loveday*, 4 Man. & G. 972; S. C. 12 Law J. Rep. (N. S.) C. B. 65. [And *Hardman v. Wilcock*, 9 Bing. 382, n. distinguished the mere commencement of an action of trover, by the assignees against the plaintiff, for the conversion of the goods: Held no election on the part of the assignees to avoid the transfer. *Newnham v. Stevenson*, 20 Law J. (N. S.) C. B. 111.]

3. *Isle of Man not within United Kingdom.*—A member of a banking company, established under 7 Geo. 4, c. 46, cannot be proceeded against in bankruptcy for a debt due from the company, no judgment for such debt having been recovered against the public officer of the company, although the company may have ceased to carry on business, and an order have been obtained for winding it up under 11 & 12 Vict. c. 45, prior to such proceedings in bankruptcy. (*Ex parte Wood*, 1 Mont. D. & D. 92; S. C. 9 Law J. Rep. (N. S.) Bank. 20, overruled.) A fiat issued against the plaintiff on the 20th of July, 1849, upon a debt due from a banking company, in which he was a member, to G., the petitioning creditor, without any judgment having been obtained against the public officer, and a warrant of seizure in the ordinary form was issued to F., the messenger, dated the 30th of July. The creditor's assignee was appointed August 21. The 12 & 13 Vict. c. 106, came into operation October 11; and on the 18th of October a seizure of the plaintiff's goods was made by the messenger F. under the said warrant: Held, that the fiat was invalid, and that either the petitioning creditor or the messenger was liable in trover for the wrongful seizure; but the court declined to determine which of the two was liable, as it was not required by the case submitted for their opinion. The Isle of Man is not within the United Kingdom; and therefore a person residing there at the time of an adjudication of bankruptcy against him, has three months within which he may contest the validity of the fiat, or petition for adjudication under 5 & 6 Vict. c. 122, s. 24, or 12 & 13 Vict. c. 106, s. 233. *Davison v. Farmer*, 20 Law J. (N. S.) Exch. 177.

BARON AND FEME.—When a wife dies her husband is bound to provide her with a funeral at a reasonable expense; and if he does not do so, any person who voluntarily employs an undertaker, and pays him for such a funeral, is entitled to recover the sum so expended from the husband in an action for money paid. *Ambrose v. Kerrison*, 20 Law J. (N. S.) C. B. 135.

BENEFIT SOCIETY.—*Discretion of secretary.*—The members of a benefit society, whose rules have been duly confirmed according to the provisions of the statute 10 Geo. 4, c. 56, have no right to compel the secretary or other chief officer of the society to sign a notice, pursuant to section 9, to convene a general meeting for the purpose of considering the question of altering the rules of the society; but such officers have under that section a discretionary power to give or withhold their signatures to any such notice. *Reg. v. Banatyne*, 20 Law J. (N. S.) Q. B. 210.

BILL OF EXCHANGE.—1. Evidence and time of protest.—

Where a bill is paid *supra protest* for the honour of a party to the bill, it is not necessary that the protest shall have been formally drawn up or extended before the payment; but it is sufficient if the bill has in fact been protested, and a declaration that the payment was for honour made before a notary, and these facts recorded in the notarial registers before the payment was made. The protest may be drawn up or extended at any time; and where protests had been formally drawn up before payment for honour and sent to Moscow, and an action was brought by the party who had paid for honour, and it was alleged in the declaration that "the bill was duly protested for non-payment, and thereupon the plaintiff declared before a notary public that he would pay and did pay the said bill under the said protest:" it was held, that duplicate protests, made out from the notary's book after the action was brought, were primary evidence as much as the protests sent to Moscow, and sufficient to support the allegation in the declaration, it having been proved that a protest in fact took place before the payment; that a declaration that the payment was for honour had been made before a notary, and that these facts had been then recorded in the notary's book. *Vandewall v. Tyrrell*, Moo. & M. 87, examined and explained. *Geralopolo v. Wieler*, 20 Law J. (N. S.) C. B. 105.

2. Gaming—Illegality.—To an action against the acceptor of a bill of exchange drawn by the plaintiff, the defendant pleaded that a bet was lost by the defendant to A. B.; and that the said bill of exchange was at the request of A. B. given and accepted by the defendant in consideration of the said bet, and to secure payment thereof, contrary to the statute, &c.; and that there never was any other consideration for the acceptance of the said bill; and that the plaintiff, at the time when he drew and the defendant accepted the same, had notice of the premises. The evidence was, that the defendant had accepted a prior bill drawn by the plaintiff in consideration of the bet lost to A. B., and that the bill sued upon was given in renewal of that prior bill. The jury found that the bill declared upon was given in consideration of the bet, and that the plaintiff had notice of it: Held, that the plea was proved: Held, also, that the plea was a good answer to the action under the 5 & 6 Will. 4, c. 41. *Hay v. Ayling*, 20 Law J. (N. S.) Q. B. 171.

3. Indorsee against acceptor—Bonâ fide holder of value.—Assumpsit on a bill of exchange, drawn by E. A. B., and accepted by the defendant payable to the order of the drawer, and by E. A. B. indorsed to W. C., who indorsed the same to the plaintiff. Plea, that the bill was drawn for the accommodation of the defendant, and for the purpose of getting it discounted, and was indorsed in blank and delivered to the defendant; that before the bill became due, the defendant delivered it to W. M., who received and held it for the special purpose of getting it discounted for the defendant, and paying over the proceeds to the defendant, or of returning the same; that W. M. did not get the bill discounted, or pay over any proceeds to him, or

return the bill, but delivered the same to W. C. for the purpose of his W. C.'s discounting it; that W. C., in violation of the said purpose and against good faith, without the authority or knowledge of the defendant or of W. M., and without any consideration or value whatever for the said indorsement, afterwards indorsed the bill to the plaintiff; and that there never was any value or consideration for the defendant's acceptance, or the said indorsements. On the part of the defendant evidence was given showing that the bill was drawn as an accommodation bill, and that W. M. had received it in the manner and for the purpose alleged in the plea; that he had indorsed it to W. C. for the purpose of his getting it discounted, who promised to do so, and to pay over the money at a stated time and place; that W. C. failed to perform his promise, and had never paid over any money on account of the bill: Held, that from such evidence the truth of the allegations in the plea as to the indorsement of the bill to the plaintiff having been against good faith and without value, might be inferred, and therefore that sufficient was shown to cast on the plaintiff the onus of proving that he had given value for the bill; and, in the absence of such proof, to entitle the defendant to a verdict in his favour. *Smith v. Braine*, 20 Law J. (N. S.) Q. B. 201.

4. *Indorsement*.—Where E. wrote his name on the back of a bill of exchange, and delivered it to B. to get it discounted, and B. deposited it with T., receiving from him a memorandum that certain goods and chattels enumerated, and amongst them the bill in question, would be sold, if not redeemed within a specified time: Held, that there was an indorsement of the bill from E. to T. *Barber v. Richards*, 20 Law J. (N. S.) Exch. 135.

5. *Replication*.—To an action upon certain bills of exchange drawn by M. and Sons upon and accepted by the defendant, and payable to the plaintiff at certain periods after date, the defendant pleaded that after the bills became due M. and Sons made an agreement with the acceptor to discharge him on receiving two shillings and ninepence in the pound, upon inter alia the said acceptance, in consideration of the payment of a certain specified sum in settlement of their differences of account, and that the plaintiff took the bills after the agreement. The plea contained averments that M. and Sons were the holders of the bills at the time the agreement was made, and that they afterwards delivered them to the plaintiffs. The replication traversed the former of these allegations: Held, that, although the replication admitted a delivery of the bill by M. and Sons to the plaintiff after the making of the agreement, that it did not admit such a delivery as to give the plaintiff a new title to the bill, and consequently that the replication was good, as putting in issue a substantial averment in the plea. *Corlett v. Booker*, 5 Exch. 197.

6. *Uncertainty in time of payment*.—Declaration by the plaintiff as payee against the defendant as drawer of a bill of exchange, directed to C. S., and requesting him ninety days after sight, or when realized, to pay to the plaintiff or order the sum of 1256*l.* 13*s.* 4*d.* sterling, value received: Held, in arrest of judgment, that the time

of payment was altogether uncertain, and therefore that the alleged bill was not a good bill of exchange according to the custom of merchants. *Semble*, also, that it would have been equally invalid, supposing the proper construction to be that it was payable at all events at the expiration of the stated period of ninety days. *Alexander v. Thomas*, 20 Law J. (N. S.) Q. B. 207.

BUILDING ACT, 14 GEO. 3, c. 78.—Under the Metropolitan Buildings Act, 14 Geo. 3, c. 78, ss. 76, 77, a magistrate has jurisdiction to fix the amount of reward to be paid to the keepers of engines brought to extinguish fires, and order it to be paid, although the parish officers do not originate any proceedings before him for that purpose. *Reg. v. Coombe*, 13 Q. B. 179.

COLONIAL LAW.—*Validity of—Specific remedy—Judgment—Action upon—Process against members of company.*—An act of the colonial legislature of New South Wales enabled the chairman of a company to sue and be sued on behalf of the company, and provided that execution upon any judgment in such an action against the chairman might be issued against the goods, lands, &c. of any member of the company in like manner as if such judgment had been obtained against him personally: Held, first, that the colonial legislature had authority to make such an act, and that it contained nothing repugnant to the law of England, or to natural justice; secondly, that the specific mode provided for enforcing the judgment by execution against a member of the company could not be obtained against a shareholder out of the colony; but, thirdly, that the judgment against the chairman might be made the foundation of an action against a member beyond the territory of the colony in the same manner as if he had been personally served, and the recovery had been against him as a party to the record. A foreign judgment is examinable, and is only *prima facie* evidence of debt here, so far as to show that the foreign court had not jurisdiction of the subject-matter of the suit, or that the defendant was never served with process, or that the judgment was fraudulently obtained; but is conclusive upon the defendant, so far as to prevent him from alleging that the promises upon which it is founded were never made, or were obtained by fraud of the plaintiff. Any pleas, which might have been pleaded to the original action, cannot be pleaded to the action upon the judgment. The defendant being sued as a member of the company, upon a contract entered into by the company, pleaded the judgment recovered against the chairman in the colony: Held, that the plea was bad. *Australasia (Bank of) v. Nias*, 20 Law J. (N. S.) Q. B. 284.

COMPANIES CLAUSES CONSOLIDATION ACT, 8 & 9 VICT. c. 16, ss. 21, 22—*Calls by instalments.*—Held on error that a call payable by instalments is valid. *London and North Western Railway Company v. M^cMichael*, 20 Law J. (N. S.) Exch. 233.

COMPANY.—7 & 8 VICT. c. 110—*Action for calls—Shareholder.*—A joint-stock company, registered under 7 & 8 VICT. c. 110, cannot maintain an action for calls until they have obtained a certifi-

cate of complete registration, and a plea that they had not obtained such a certificate is an answer to the action. But this defence will not arise under a plea of never indebted, or a plea traversing that the plaintiffs were a completely registered company. Where a deed is altered in a material part it ceases to have any new operation, and no action can be brought in respect of any pending obligation which would have arisen from it had it remained entire; but it may still be given in evidence to prove a right or title created by its having been executed, or to prove any collateral fact. Where in an action of debt for calls, under 7 & 8 Vict. c. 110, s. 55, it appeared that the deed of settlement of the company had been executed by the defendant as a shareholder, but there was an unexplained erasure of the name of another person who had signed it as a shareholder, it was held, that the deed might be given in evidence to prove the fact of the defendant being a shareholder. *Quære*, whether such an erasure could in any mode affect the defendant's liability under the deed. *Agricultural Cattle Insurance Company v. Fitzgerald*, 20 Law J. (N. S.) Q. B. 244.

COMPETENCY OF WITNESS UNDER STAT. 6 & 7 VICT. c. 85.—*Legatee.*—A will charged the devised land with the payment of legacies. In ejectment brought against the devisee to dispute the will: Held, that since stat. 6 & 7 Vict. c. 85, a legatee was a competent witness for the defendant. *Doe d. Wingrove v. Nicholl*, 13 Q. B. 126.

CONTRACT.—*Construction.*—The defendant, a coal factor, sold coals for the plaintiff upon the following authority:—"Please sell for me 250 tons of coal, at such a price as will realize me not less than 15s. per ton net cash, less your commission:" Held, not to support a declaration for breach of contract in not selling for ready money. The meaning of such a contract is—"Sell for me, so as to have ready money forthcoming to me on the day of sale to the amount of 15s. per ton." *Boden v. French*, 20 Law J. (N. S.) C. B. 143.

CORONER.—7 & 8 Vict. c. 92—*Division.*—The 7 & 8 Vict. c. 92, enables the Queen, by order in council, to direct that any county shall be divided into districts, to each of which a separate coroner is to be appointed; and by section 6, where "any such county has been customarily divided into districts for the purpose of holding inquests during seven years before the passing of the act, and it shall seem expedient to her majesty that the same division of the county be made under the act, each of such districts shall be assigned to the coroner usually acting in and for the same district; but if it shall appear expedient to her majesty that a different division of such county be made, and any coroner shall present a petition praying for compensation for the loss of his emoluments arising out of such change, her majesty may direct the lords of the treasury to assess the amount of such compensation:" Held, that the power to direct compensation to be assessed extended only to those cases where a county had been customarily divided into districts for seven years before the passing

of the act, and where a different division is ordered under the act. *Reg. v. Lechmere*, 20 Law J. (N. S.) Q. B. 169.

CORPORATION.—Contract not under seal.—In an action of assumpsit, the declaration stated that in consideration that the plaintiffs would sell to the defendants iron rails, the defendants agreed to furnish to the plaintiffs sections of the said railways, averring mutual promises, and alleging as a breach the non-delivery of the sections by the defendants. It appeared that the plaintiffs were incorporated by a charter, for the purpose of carrying on the business of copper miners, and that the contract in question was not under seal, and did not fall within any of the exceptions to the general rule that a corporation can only bind itself by deed. That the contract was not incidental or ancillary to carrying on the business of copper miners, and was therefore not binding on the corporation. That no other charter authorizing the company to deal in iron could be presumed to exist, the charter which was given in evidence not supporting such authority. That, as the corporation could not be sued upon this contract, and as the alleged promise by them formed the consideration for the defendants' promise, the corporation could not sue upon the contract. *Semble*, that the doctrine cannot be supported that a corporation may sue as plaintiffs upon a simple contract, upon the ground that by so doing they are estopped from objecting that the contract was not binding upon them. At all events, such an estoppel could only support an action of covenant, as upon a contract under seal. *Copper Miners (Governor and Company) v. Fox*, 20 Law J. (N. S.) Q. B. 174.

COSTS.—1. *Certificate for, under 9 & 10 Vict. c. 95, s. 129.*—Under the 9 & 10 Vict. c. 95, s. 129 (the County Courts Act), a judge of a superior court may certify for costs at any time before the costs are taxed. *Tharrat v. Trevor*, 20 L. J. (N. S.) Exch. 189.

2. *Security for—Irish Railway Company.*—The plaintiffs, a railway company, whose line was in Ireland, carried on their business in Westminster, having no property of the company in Ireland, and their property in England not being sufficient to answer the defendant's costs. The most affluent of four-fifths of the shareholders resided in England; none of them, except three, had paid up more than 2l. 10s. per share, and a considerable number of the said four-fifths were responsible to the extent of the capital not paid up. The plaintiffs were compelled to give security for costs. *Kilkenny and Great Southern and Western Railway Company v. Fielden*, 20 Law J. (N. S.) Exch. 141.

3. *Taxation of—Travelling expenses of witnesses.*—Under the directions to taxing officers, of Hil. Vac. 4 Will. 4, the allowance to witnesses for travelling is to be the expenses actually paid, not exceeding 1s. per mile, unless under special circumstances: Held, that the masters are bound to allow only what has been reasonably expended by the witnesses, not exceeding 1s. per mile, and that they cannot look to what has been paid by the party to the witnesses for

their travelling expenses. *Hunter v. Liddell*, 20 L. J. (N. S.) Q. B. 200.

4. *Town councillor—Candidate.*—S. and H. were rival candidates for the office of town councillor of a borough. An objection was taken at the election to the validity of certain votes in S.'s favour, which turned the election. The mayor overruled the objection, and S. took his seat. The rival candidate obtained a rule nisi for an information in the nature of a quo warranto against S. The latter thereupon declined to show cause, and expressed a willingness to resign his seat: Held, that S. was liable to the cost of the information, as he had been a candidate for the office. *Reg. v. Sidney*, 20 Law J. (N. S.) Q. B. 269.

5. *Town councillor—Valid resignation of office.*—M. was elected a town councillor of the borough of B. without his knowledge or consent, but being informed that he would be liable to a fine if he refused to serve, he, on that ground, agreed to accept the office, and made the necessary declaration. No application was made to him to resign the office. A rule nisi for an information in the nature of a quo warranto, to show by what authority he held the office, having been obtained, he, as soon as he heard of it, expressed his willingness to resign, and allowed the rule to be made absolute without supporting the validity of his election: Held, that he was not to be liable for costs, if, within a week, he made a valid resignation, or if an information in the nature of a quo warranto were filed at the expense of the prosecutor, if M. at his own expense, within a week after the filing of the information, put in a valid disclaimer; but that, failing these alternatives, the rule was to be made absolute, with costs. *Reg. v. May*, 20 Law J. (N. S.) Q. B. 268.

COUNTY COURT.—1. 9 & 10 Vict. c. 90, s. 58, and 13 & 14 Vict. c. 61, s. 13—*Costs.*—Where a plaintiff recovers in a superior court a less sum than those mentioned in the 13 & 14 Vict. c. 61, s. 11, in any of the actions there specified, the onus of proving that he is entitled to costs under sect. 13 of the same act is cast upon him; and if he claims his costs upon the ground that title was in question, under the 9 & 10 Vict. c. 95, s. 58, he is bound to establish the fact that the title did really *bonâ fide* come in issue, and not merely that the defendant so pleaded that it might possibly have come in issue. Where to an action of trespass *quare clausum fregit* the defendant pleaded "not possessed," but no question of title in fact came in question: Held that the jurisdiction of the county court was not ousted. *Latham v. Spedding*, 20 Law J. (N. S.) Q. B. 302.

2. 9 & 10 Vict. c. 95.—A clerk to the privy council is not a person who "carries on his business" at the office of the privy council within the meaning of the 60th section of the County Courts Act, 9 & 10 Vict. c. 95. *Sangster v. Kay*, 5 Exch. 386.

3. 9 & 10 Vict. c. 95, s. 128—*Suggestion to deprive plaintiff of costs.*—An affidavit for a suggestion to deprive a plaintiff of costs under the County Courts Act stated as follows: "That the plaintiff now dwells, and at the time of the commencement of this action dwelt at Birmingham, in the county of Warwick, which is within

twenty miles from Bilston, the place where the defendant now dwells, and also within twenty miles from Wolverhampton, in the county of Stafford, the place where the defendant dwelt and carried on his business at the time this action was commenced:" Held insufficient. *Fry v. Whittle*, 20 Law J. (N. S.) Exch. 231.

4. *Action against high bailiff*.—If an action be brought in the superior courts against the high bailiff of a County Court, in respect of a claim to goods and chattels taken in execution of the process of the court, and the jury give less than 20*l.* damages, section 139 of the statute 9 & 10 Vict. c. 95, deprives the plaintiff of costs, unless the judge certify that the action was proper to be brought in such superior court; and the plaintiff is not entitled to costs under section 128, for the case falls within the exception in that section. On the plaintiff proceeding to tax his costs, it was admitted before the Master that the defendant was the high bailiff, and no objection was then taken that the defendant had not applied to enter a suggestion, and the Master declined to tax the costs: Held, that the objection of the want of proof that the defendant was high bailiff, and of the want of a suggestion, could not be taken on a motion to review the Master's decision. *Mann v. Buckerfield*, 20 Law J. (N. S.) Q. B. 265.

5. *Certiorari*.—The writ of certiorari to remove a cause from the County Court, in which the amount claimed is between 20*l.* and 50*l.*, is not taken away by the statute 13 & 14 Vict. c. 61, s. 16. Service of the certiorari on a person acting as clerk at the office of the chief clerk of the County Court is good service on the judge, though not sufficient to ground an attachment against the judge where the writ does not come to the judge's knowledge until after the return day has passed. The judge should be ruled to return the writ. *In re Brookman v. Wenham*, 20 Law J. (N. S.) Q. B. 278.

CUSTOMS. See REVENUE.

DEBT. — 1. *Merger of—Pleading—Replication*. — A bond given for a simple contract debt merges it, whatever may have been the intention of the parties. To an indebitatus count in debt for 6000*l.*, the defendant pleaded as to 3000*l.*, parcel, &c., that he agreed with the plaintiffs to deliver an indenture conditioned for the payment of the said sum of 3000*l.* on a certain day; that the defendant, with the assent and consent, and at the request of the plaintiffs, did deliver an indenture and thereby covenanted to pay the said sum of 3000*l.* Replication, that the indenture was made by way of security for the payment of the said sum, and that it was expressed to be made as such security. On demurrer: Held, that the plea was a good plea of merger, although it contained no allegation that the deed was accepted in satisfaction, and that the replication was bad and gave no answer to the plea. *Price v. Moulton*, 20 Law J. (N. S.) C. B. 102.

2. *Plea of payment of a small sum in satisfaction of a larger—Judgment non obstanto veredicto*.—A declaration in debt claimed 44*l.* The only plea was payment and acceptance of 15*l.* in satisfaction of the debt. After issue joined on a traverse to the plea a verdict

was found for the defendant: Held, that the plaintiff was not entitled to judgment non obstante veredicto, because although the general rule of law is, that payment of a smaller sum cannot be pleaded in satisfaction of a larger, yet, since the Reg. Gen. of Trinity Term, 1 Vict., which relieves a defendant from pleading payment when a plaintiff by his particulars gives credit for a payment, the court will, after verdict, presume, unless the contrary be proved, that the plaintiff may have delivered particulars, giving credit for payments, and so reducing the balance sought to be recovered to an amount less than that covered by the sum stated in the plea. *Turner v. Collins*, 20 Law J. (N. S.) Q. B. 259.

DEPOSITIONS.—Under stat. 11 & 12 Vict. c. 42, s. 17, the deposition of a witness, who is so ill as not to be able to travel, may be read in evidence before the grand jury as well as before the petty jury. *Reg. v. Clements*, 2 Cr. Cas. 251.

DEVISE.—*Construction.*—J. D., at the time of making her will, was entitled to two freehold estates, one in the county of Westmoreland and the other in the county of Berks, and also two copyhold estates, one called Hempstead and the other Cockcoms. In 1778 J. D. made her will, and devised her freehold estates, after certain life estates, to her great nephew T. B. for life, then to his issue for their respective lives, remainder to his brother H. B. for life, then to his issue for their respective lives, and then to S. E. for life and her issue, remainder to the right heirs of the testatrix. She devised the copyhold estate of Hempstead, after certain life estates, to H. B. for life, remainder to his issue, remainder to T. D., and the copyhold estates of Cockcoms after the same life estates to H. D. for life, remainder to his issue, remainder to H. D. The freehold estate in the county of Berks the testatrix devised, after certain life estates, to T. D., remainder to his issue for their respective lives, remainder to his brother H. D. and his issue in like manner, remainder to S. E. for life and her issue, and then, with limitations over in strict settlement, to certain collateral relations of the testatrix. In 1784 the testatrix made the following codicil:—and whereas I have in and by my said will, in the disposition I have therein made of my share of the real estates in the county of Westmoreland, after the several limitations in favour of my great nephew T. B. shall be spent, limited the same precisely in the same manner to his brother H. D. B., I do hereby confirm the same, and further declare my mind and will to be, that, in the next disposition made in my said will of and to my share of the several copyhold estates of Cockcoms, &c., the said T. B. shall, after the limitations in favour of his brother H. D. B. shall be spent, have precisely the same estate and interest therein before the subsequent limitations to T. D. and R. D. shall respectively take place as the said H. D. B. shall in and by my said will in the estates in the said county of Westmoreland; and I do hereby give and devise the copyhold estate which I lately purchased of the widow K., and which, after my admittance to the same, I surrendered to the use of my will to the said H. D. B., with the like limitations over as are contained in my said will and this codicil concerning my other copy-

hold estates in the said county of Hertford or elsewhere: Held, that according to the true construction of this codicil and will the copyhold estate of Cockcoms was devised to T. B. and his issue for life. *Grover v. Burningham*, 5 Exch. 184.

DISTRESS.—*Notice of abandonment of.*—A notice of distress stated, "that by virtue of an authority to me given, &c. I have seized the goods, chattels and effects specified in the schedule hereunto annexed for the sum of 170*l.* due," &c. The schedule specified certain goods, and concluded thus: "and all other goods and chattels and effects that may be found in and about the said premises that may be required in order to satisfy the above rent, together with the expenses:" Held, that this notice did not justify the seizure of any goods besides those specified in the schedule. A. distrained for rent due from his tenant B., a livery stable-keeper, and took a pony and carriage belonging to one of B.'s customers. While the broker was in possession, the owner, who was ignorant of the distress, was allowed to take his pony and carriage out as usual, the broker believing that he would bring them back: Held, that this was not an abandonment of the distress, and that the owner having brought them back, they were still subject to the distress. *Kerby v. Harding*, 20 Law J. (N. S.) Exch. 163.

DISTRINGAS.—*To compel appearance, defendant keeping out of the way in London.*—The defendant had no known residence, and could not be found, but he called occasionally at his solicitor's for letters, and answered such letters, posting them in London. The plaintiff's solicitor wrote to the defendant, inclosing a copy of the writ of summons, directed to the defendant, at his solicitor's, and a correspondence afterwards passed between the plaintiff's attorney and the defendant respecting a compromise of the plaintiff's claim. The court granted a distringas to compel an appearance, though there had not been the usual calls and appointments. *Gorringe v. Terrewest*, 20 Law J. (N. S.) Q. B. 209.

ELECTION OF MAYOR.—On a quo warranto information for exercising the office of mayor, it is no objection to the title that the party, who was councillor when elected mayor, is not shown to have been on the burgess roll at that time, it being admitted that he was de facto councillor when elected mayor, and that he was on the burgess roll when elected councillor: So held on demurrer to the rejoinder; defendant having pleaded his election as councillor and as mayor, but not having shown that he was on the roll when elected mayor; the crown replying, that he was not on the roll for the year in which that election took place; defendant rejoining, that at the time of that election he was "entitled to be" on the roll, and qualified to be elected, and to be, a councillor. *Reg. v. Dixon*, 15 Q. B. 33.

EVIDENCE.—1. The master of a foreign vessel arriving in the port of London delivered to the custom-house officers a report of the burthen of his ship, and the number of his crew; and it was filed at the custom-house: Held, that the provisions of stat. 8 & 9 Vict. c. 86, ss. 2, 7, 18, did not give this the character of a public document, so

as to make it evidence of the burden of the ship. A certificate was produced from the custom-house, where it had been filed, signed by a party who certified that he had measured the vessel, and stated the amount of the tonnage: Held, (it not being shown that this was an act prescribed by statute,) that the certificate could not be received in evidence as a public document to prove the burthen of the ship. *Huntley v. Donovan*, 15 Q. B. 96.

2. *Conviction quashed*.—In an indictment for larceny, the property stolen was laid as belonging to Darius Christopher. The prosecutor, when called, said that his name was Trius: Held, that it was entirely a question for a jury, whether the two names sounded alike; and therefore, as it had been treated at the trial as a question at law for the judge, the conviction was quashed. *Reg. v. Davis*, 2 Cr. Cas. 231.

FEIGNED ISSUE UNDER INCLOSURE ACT.—*Costs of proceedings*.—Where the court have granted an application for a feigned issue, under the statute 8 & 9 Vict. c. 118, s. 44, to try whether a certain close be part of a particular manor, and the applicant, the plaintiff in the feigned issue, fails on the trial, the court will order him to pay costs of it to the defendant in the feigned issue. *Reg. v. Kelsey*, 20 Law J. (N. S.) Q. B. 283.

GUARANTEE FOR A FRAUDULENT PURPOSE.—1. Assumpsit on defendant's guarantee for a debt due from S. to plaintiff, the promise alleged being, that if plaintiff would give S. a written acknowledgment that plaintiff had no legal claim on S., defendant would be answerable for the amount, with an averment that plaintiff wrote and sent such acknowledgment to S. Plea, that S. was a trader within the Bankrupt Acts, and a prisoner in execution for debt, owing 300*l.* and upwards, and was desirous of petitioning the Court of Bankruptcy for an interim order of protection, under stat. 7 & 8 Vict. c. 96, s. 6, and in support of such petition of falsely representing himself to the court as owing less than 300*l.*; and that defendant, at the request of S., gave the guarantee above stated, with the intent, on the part of S. and defendant, that S. should be better able falsely to make such representation. Averment, that plaintiff knew the corrupt purpose for which the guarantee was given, and with such knowledge accepted it, and assented to write the acknowledgment for the purpose of aiding S. in making the false representation, &c. Replication, *de injuria*: Held, on proof of the facts pleaded, and that plaintiff's acknowledgment was not a release under seal, that defendant was not entitled to a verdict on the evidence; and that plaintiff was not entitled to judgment non obstante veredicto. *Coles v. Strick*, 15 Q. B. 2.

2. *Consideration—Promise—Variance*.—Plaintiffs wrote to defendant—"We are doing business with B., and require a guarantee to the amount of 200*l.*, and they refer us to you." Defendant wrote in answer—"I have no objection to become security for B., and subjoin a memorandum to that effect." The memorandum subjoined was—"I hereby engage to guarantee to Messrs. Colbourn,

iron masters, 200*l.* for iron received from them for B., as annexed:” Held, that these three documents were to be read together, and that the words “we are doing business,” taken with the rest, showed that the consideration for the defendant’s undertaking was that the plaintiffs should continue to supply B. with goods, and that there was therefore a good consideration. Per Jervis, C. J.—If the last document alone had constituted the contract, parol evidence would have been admissible to construe the words “for iron received.” The declaration alleged that, in consideration that the plaintiffs at the request of the defendant would deliver certain iron to B. on credit, the defendant promised to guarantee to the plaintiffs the price of the said iron to the amount of 200*l.*: Held, that there was no variance; that the promise was to be looked at apart from the consideration; that, assuming the guarantee to contain a promise to guarantee to the plaintiff the price of iron supplied, it also contained a promise to guarantee the price of iron to be supplied, and that the plaintiff was not bound to state the whole of the promise, but only the part for the breach of which he sued. *Colbourn v. Dawson*, 20 Law J. (N. S.) C. B. 154.

HIGHWAY.—*After dedication, but before notice given under Highway Act, 5 & 6 Will. 4, c. 50, s. 23.*—If a road be dedicated to the public and used, but the necessary steps have not been taken, by notice, &c. under stat. 5 & 6 Will. 4, c. 50, s. 23, to make it repairable by the parish, it is still a highway in other respects, and an action is maintainable for obstructing it to the plaintiff’s damage. *Roberts v. Hunt*, 15 Q. B. 17.

HUSBAND AND WIFE.—A husband and wife separated by agreement (not under seal), and at that time he agreed to allow her a certain sum weekly for her support, which was paid, and she saved a certain portion of her allowance and invested it in stock, but a few days before her death she sold out the stock, and disposed of the proceeds by way of gift: Held, that the husband was entitled to recover back the money so given in an action for money lent against the person who received it. *Messenger v. Clarke*, 5 Exch. 388.

INCORPORATED COMPANY.—*Implied contract.*—A public company incorporated under act of parliament cannot generally contract except in the mode and upon the conditions specified either in the special act or the general act to which it is subject, such as the Companies Clauses Act, 8 & 9 Vict. c. 16. The plaintiff, an engineer, entered into a contract, under seal, with the Wolverhampton Waterworks Company for the supply of machinery and the execution of works for the purposes of the company, with certain provisions as to extra work. The company was incorporated, subject to the general provisions of the 8 & 9 Vict. c. 16, but by the Special Act three directors were made a quorum. Much extra work was done by the plaintiff, with the sanction of the engineer of the company, but not according to the provisions of the contract; and after the work was done and a claim made by him for payment of the

price stipulated in the contract, together with a further sum for the extra work, a sum of 1000*l.* was paid to him on the general account, but no proof was given that this payment was made by the order of three directors: Held, in an action brought to recover for the extra work, that there was no evidence to go to the jury of any contract with the company. *Quære*, whether upon proof that such payment had been made by order of three directors any contract binding on the company would have been implied. *Fromersham v. Wolverhampton Waterworks Company*, 20 Law J. (N. S.) Exch. 193.

INDICTMENT.—1. Two persons charged in an indictment with a joint felony, ought not to be sentenced thereon on proof of two distinct felonies. If a verdict of guilty be given against both, judgment may be given against the party who is proved to have committed the first felony in order of time. *Reg. v. Dovey and Gray*, 2 Cr. Cas. 86.

2. *Abandonment.*—An indictment alleged, “that the prisoner, intending to injure the inhabitants of the parish of B., and to burthen them with the maintenance of a bastard child of the prisoner, four days old, and not named, and unable to walk, or to take care of itself, or to make known its wants, did abandon and desert the said child, without having provided any means for its support:” Held bad, 1, because there was no averment that the prisoner had the means of supporting the child; or, 2, that the child had sustained any injury by the abandonment. *Reg. v. Hogan*, 2 Cr. Cas. 277.

INSOLVENCY.—*Assignees’ liability.*—A creditors’ assignee in insolvency, under 5 & 6 Vict. c. 116, s. 1, and 7 & 8 Vict. c. 96, s. 4, is not liable for the messenger’s fees, except upon an express contract. *Hamber v. Hall*, 20 L. J. (N. S.) C. B. 157.

INSURANCE.—1. *Corn free from average—Total loss.*—Where corn is insured free from average, and in consequence of injury sustained by the ship is damaged in the voyage, and taken out at an intermediate port during the repairs of the ship, there is not a total loss unless the corn is in such a condition that the expense of bringing it to the port of destination for sale would exceed the value of it when brought; and it is not a proper question to leave to the jury, whether the insured had acted as a prudent uninsured owner would have acted under the circumstances. *Keimer v. Kingrose*, 20 L. J. (N. S.) Exch. 175.

2. *Sea policy.*—A marine policy was made subject to certain rules, one of which was, that ships were not to sail from any of the ports following, between the times set opposite thereto, that is to say, from any port on the east coast of Great Britain, between the 5th of October and the 5th of April, to any ports in the Belts, between the 20th of December and the 15th of February. The plaintiff’s vessel sailed on the 8th of February for F., a port in the Belts, and was lost: Held, in an action by the assured against the insurer, that the rule amounted to a warranty, and not to an exception, and that the plaintiff was not entitled to recover in respect of the loss: Held, also,

that the word "to," as used in this rule, meant towards. *Colledge v. Harty*, 20 L. J. (N. S.) Exch. 146.

ISLE OF MAN. See BANKRUPTCY.

JOINT STOCK COMPANY.—The plaintiff having brought an action against A. B. for goods supplied to a joint stock company, of which the defendant was a member, and the action having been stayed under the Winding-up Act, 11 & 12 Vict. c. 45, until the plaintiff should prove his claim before the Master (which he failed to do), he obtained an order to be allowed to proceed in the action, and to substitute C. D., the official manager of the company, as defendant, in lieu of the then defendant. The plaintiff thereupon entered a suggestion on the record, which stated, that "the action was commenced, and had hitherto been prosecuted against A. B., as a person authorized to be sued as the nominal defendant on behalf of the company: Held, that the acts of A. B. were not admissible in evidence on the trial of the cause against C. D.; as the plaintiff's suggestion alleged that A. B. had been sued as a mere nominal defendant. *Armstrong v. Normandy*, 5 Exch. 409.

JUDGMENT AS IN CASE OF NONSUIT.—*Statements of defendant.*—The defendant induced the plaintiff to discount his acceptance, upon his representation that he was of age; and when it was presented for payment raised no objection on the ground of his infancy, but upon being sued upon it, pleaded infancy. The plaintiff then made inquiries, and having satisfied himself that the plea was untrue, joined issue, and gave notice of trial; but he subsequently ascertained from documents in the defendant's possession, that the plea was true, whereupon he countermanded notice of trial, and took no further proceedings: Held, that the defendant was not entitled to judgment as in case of nonsuit. *Newton v. Farrall*, 20 L. J. (N. S.) Exch. 201.

LAND TAX.—*Assessment within divisions — Mandamus.*—Although the assessments of the land tax on counties are fixed and perpetual, the Commissioners are bound to assess the amount charged upon each land tax division of the county by an equal pound rate upon all the parishes, &c. within the division, with reference to the existing value of property throughout the division. But a mandamus will not lie to the Land Tax Commissioners to assess the proportion of land tax charged on a division of a county equally upon every parish and place within the division. *Pym, Ex parte, Land Tax Commissioners, In re*, 20 L. J. (N. S.) Q. B. 211.

LANDLORD AND TENANT.—1. *Distress — Covenant to consume hay on premises.*—A landlord who has distrained his tenants' hay made on the premises, and has sold it, subject to a condition that it shall be consumed by the purchaser on the premises, by reason whereof it produces less than the usual price, is liable to the tenant in an action for not selling for the best price, notwithstanding that

the latter was under covenant to consume such hay on the premises. *Ridgway v. Lord Stafford*, 20 Law T. (N. S.) Exch. 226.

2. *Distress for rent*.—Under a warrant of distress for arrears of rent, a landlord has no power at common law to break open the outer door of any building. *Brown v. Glenn*, 20 Law J. (N. S.) Q. B. 205.

LARCENY.—A. bargained with B. about some waistcoats, said, "You must go to the lowest price, as it will be ready money;" B. said, "Then you shall have them for twelve shillings; to which A. assented. A. then said he should put the waistcoats into his gig, which was then standing at the door. B. replied "very well." A. drove off with the waistcoats without paying for them, and absconded for two years. The jury returned the following verdict: In our opinion the waistcoats were parted with conditionally, that the money was to be paid at the time, and that A. took them with a felonious intent: Held, a larceny in A. *Reg. v. Cohen and Collins*, 2 Cr. Cas. 249.

LEGACY DUTY.—*Administration in India*.—An officer in her Majesty's army, serving in the East Indies, died there intestate, leaving the whole of his property, except 92*l.*, due to him from the War Office, actually situate there. His widow took out letters of administration in Bombay, paid the debts, funeral expenses, &c. and invested the residue there for the benefit of herself and child as next of kin. A year and a half afterwards she returned to England, and took out letters of administration in this country, for the purpose of recovering the sum of 92*l.*: Held, that as the intestate was domiciled in the country, the widow was bound to account for and pay legacy duty on the whole of the property in the East Indies. *Attorney General v. Napier*, 20 Law J. (N. S.) Exch. 173.

LIMITATIONS, STATUTE OF.—*Part payment—Verbal acknowledgment of payment*.—A parol admission made by a party, that he has within six years paid part of the principal or interest of a debt accrued more than six years ago, is sufficient to take the case out of the Statute of Limitations, overruling *Willis v. Newnham*. *Cleave v. Jones*, 20 Law J. (N. S.) Exch. 238.

LONDON POLICE ACT, 2 & 3 Vict. c. xciv.—A police constable of the city of London has no power under the 2 & 3 Vict. c. 94, to take a person into custody without warrant, merely on suspicion that he has committed a misdemeanor. *Bowditch v. Balchim*, 5 Exch. 378.

MALICIOUS ARREST.—A declaration for a malicious arrest by *capias*, under the 1 & 2 Vict. c. 110, stated that the defendant, not having any reasonable or probable cause of action against the plaintiff to the amount for which he maliciously caused the plaintiff to be arrested, falsely, maliciously and unjustly procured from a judge an order for a *capias*, by falsely and maliciously representing to the judge that the plaintiff was justly and truly indebted to the

defendant in a certain sum, by means of a certain false affidavit then shown and uttered by the defendant before the judge, and thereupon maliciously caused a *capias* to be issued, and without any reasonable or probable cause of action caused the plaintiff to be arrested: Held, on special demurrer, that the declaration was sufficient, and that it need not more particularly set out the false statement by which the judge was induced to make the order, nor show that the facts were false within the defendant's knowledge, or that he had not reasonable or probable cause for believing them true. *Ross v. Norman*, 5 Exch. 359.

MANDAMUS.—*Railway company—Summoning jury to assess the amount of compensation.*—Where within the prescribed period the promoters of a railway company gave notice to a landowner on the intended line of railway, that they required to purchase his lands, and the landowner served them with a notice to treat, and demanded that the amount of compensation should be settled by a jury, and no farther steps were taken to complete the purchase, until after the expiration of the period prescribed for the exercise of the powers of the company for the compulsory purchase and letting of the lands: Held, that the company might, on the application of the landowner, notwithstanding the lapse of time, be compelled by mandamus to issue their warrant to the sheriff to summon a jury to assess the amount of compensation. *Birmingham and Oxford Junction Railway Company v. Reg.* 20 Law J. (N. S.) Q. B. 304.

MANDAMUS. See **LAND TAX.**

MIS-TRIAL.—*Special jury—Juror answering to wrong name—Objection before verdict—Venire de novo.*—Just before the verdict was delivered in a special jury cause it was discovered that one of the special jurors impanelled had been summoned in another cause, and had by mistake answered to a wrong name. The defendant then objected to the verdict being received, and thereupon the learned judge offered to discharge the jury and try the cause over again. This, however, was not assented to, and the plaintiff claiming to have the verdict taken, the jury ultimately returned their verdict in favour of the plaintiff: Held a mis-trial; and that, as the defect had been discovered and objected to before a verdict was given, the court was bound to award a *venire de novo*. *Doe d. Ashburnham v. Michael*, 20 L. T. (N. S.) Q. B. 276.

MUNICIPAL CORPORATION.—1. *Burgess roll.*—A notice of claim, made under sect. 17 of the 5 & 6 Will. 4, c. 76, to be inserted on the burgess roll of a municipal corporation, must state the parish in which the property is situated in respect of which the claim is made. By a local act of the borough of K., owners of dwelling-houses within the borough, of a less yearly rent than 10*l.*, were to be rated to the poor instead of the occupiers. The overseers were, by sect. 2, empowered to compound with the owner at one-third the rate, where the "annual rent and value did not amount to 7*l.*, and at one-half the rate where the annual rent or value amounted to 7*l.*,

but did not amount to 10l." Sect. 15 provided, that nothing in the act was to prejudice or affect any municipal or parochial franchises of the occupiers, but that they might claim to be put on the burgess roll as if that act had not been passed, and the occupiers had been rated and assessed to the poor in their own names. M. claimed to be put on the burgess roll of the borough of K. in respect of a house which he occupied as tenant at a yearly rent of 7l. The house was stated in the poor rate to be of the gross estimated value of 6l. 10s., of the rateable value of 5l. 4s. His landlord had compounded with the overseers at one-third the poor rate, and had duly paid his composition. The borough rates of K. were paid out of the poor rates: Held, that under the local act the criterion for composition was the rent which could fairly be obtained when the premises were let, or the value for which they could be let when they were vacant; but that the title of the occupier to be put upon the burgess roll would not be affected by any mistake in the amount of the composition between the owner and overseers; that the overseers were entitled to include the borough rate in the composition, as part of the poor rate; and that payment of the composition was equivalent to the payment of the borough rate. *Reg. v. Kidderminster (Mayor and Assessors of the Borough of)*, 20 L. J. (N. S.) Q. B. 281.

2. *Special overseer*—7 Will. 4 & 1 Vict. c. 81.—A special overseer, appointed under the 7 Will. 4 & 1 Vict. c. 81, s. 3, to make, levy or collect borough rates in a parish lying partly within and partly without a borough, is not an annual officer, nor is he such an officer as could be appointed under the 5 & 6 Will. 4, c. 76, s. 58. Therefore, where the defendants had entered into a bond as surety for W. R., and the condition of the bond recited that W. R. had been appointed to act as overseer for making, &c., borough rates within part of the parish of A., situate within a borough, during the pleasure of the council, and the bond was conditioned for the due performance of his duties by W. R. during such time as he should act as such overseer, and in an action upon the bond the defendants set out the bond and condition upon oyer, and pleaded that W. R. was duly appointed by the council to act as such overseer, subject to the pleasure of the said council, for the period of one year and no more, under and by virtue of the 7 Will. 4 & 1 Vict. c. 81, and alleged performance of the duties of the said office by W. R. during the period of one year for which he acted as such overseer: Held, on demurrer to the replication, that the plea was no answer to the action. *Mayor, Aldermen and Burgesses of Birmingham v. Wright*, 20 L. J. (N. S.) Q. B. 214.

NIGHT POACHING.—In order to bring a case of night poaching within the stat. 9 Geo. 4, c. 69, s. 9, it is not necessary to prove that three persons were all within the same close or inclosure, or the same piece of open land, if all were of one party, one or more being armed, with the same common purpose, in the place described in the indictment. *Reg. v. Uezzell*, 2 Cr. Cas. 274.

NOTICE OF ACTION.—9 & 10 Vict. c. 95.—*Acting in pursuance of statute.*—The act of 9 & 10 Vict. c. 95, s. 138, enacts, that in all actions to be commenced against any person for anything done in pursuance of that act, notice in writing of such action shall be given to the defendant one month before action brought. In the case of an action brought against the judge of one of the County Courts established under the act, for disobeying a writ of prohibition in proceeding with a matter therein referred to, such judge is entitled to notice under the above section, if he proceeded honestly, believing that his duty as a judge under the act called upon him to do so. Where the jury have found a verdict for the defendant, with leave given to the plaintiff to enter a verdict for a sum at which his damages have been contingently assessed at the trial, the court will not afterwards grant a new trial in order that there may be a fresh assessment of damages, unless the plaintiff's counsel has objected to such contingent assessment at the trial. *Booth v. Clive*, 20 L. J. (N. S.) C. B. 151.

NUISANCE.—In case against the defendants for disturbing the plaintiff in his occupation of an hotel, the defendants pleaded that they were a joint-stock company, registered pursuant to the 8 & 9 Vict. c. 110, for the purpose of establishing and carrying on a communication by means of steam-boats between England and certain ports of France, being a purpose of great general and public utility and advantage; that it was necessary for them, for the purpose of carrying on the said communication, to construct and repair steam-boats and other vessels, and the machinery thereof; that it was greatly for the public advantage that the said construction and repairs of the said steam and other vessels should be executed at some convenient place near to the port of F., because the same could be there done at less expense, and so the company would be enabled to charge the public lower rates or fares; that the premises where the alleged nuisances were committed were a convenient place near to F. for the purpose aforesaid; and that the noises, &c. complained of were necessarily and unavoidably made in the execution of such repairs, &c. The plaintiff replied, admitting that the defendants were a joint-stock company registered pursuant to the statute, *de injuriâ suâ propriâ absque residuo causæ*, and added the *similiter*; and on the 7th of July delivered the issue, with notice of trial for the then next assizes. On the 17th of July, the defendants gave notice that they had struck out the *similiter*, and delivered a demurrer to the replication, on the ground that, the plea not consisting of mere matter of excuse, *de injuriâ* was inapplicable. On the 29th, a judge, on summons, set aside the demurrer as frivolous, and ordered that the issue delivered should stand, and the cause be tried accordingly. The cause was tried, and the plaintiff obtained a verdict: Held, that the order was properly made, and the trial regular. *Heginbotham v. South-Eastern and Continental Steam-Packet Company*, 8 C. B. 329.

OUTLAWRY.—*Reversal of.*—A rule to reverse an outlawry for error in fact, where the defendant in error has not pleaded to the

assignment of errors within the time allowed, is a rule to show cause only, and is not absolute in the first instance, but upon such rule being made absolute, no terms will be imposed. *Howard v. Kershaw*, 20 Law J. (N. S.) Exch. 237.

PAROCHIAL CHAPELRY UNDER 1 & 2 WILL. 4, c. 38.—Under the 1 & 2 Will. 4, c. 38, s. 14, by which the fees, dues, offerings or emoluments of right or custom belonging to the incumbent of the parish chapelry, or place in which the newly-erected church is situate, are to be received on account of such incumbent, except such part as the commissioners, with the consent of the bishop, the patron, and the incumbent in some places, and the bishop alone, with the consent of the patron and incumbent, in others, shall assign to the minister of the district church, the term “chapelry” means a legal parochial chapelry, and therefore one which is immemorial. Upon a trial, where the question was, whether the chapelry of St. H. was a legal parochial chapelry: Held, that the statement of a witness, that he had heard from a former incumbent of St. H. that the people of four townships and another parish came to the chapelry, was admissible in evidence, inasmuch as the rights of the chapel in question were sufficiently of a public nature to make reputation admissible. So, a case stated by a deceased incumbent of St. H. for the opinion of a proctor, with his opinion thereon, was held admissible, on the same principle as the statement of a deceased occupier which qualifies his estate is admissible: Held, also, that the answer of the incumbent of St. H., and other clergymen, to questions sent by the bishop of C. the diocesan, for the information of the Governors of Queen Anne’s Bounty, at the time an augmentation was made, was admissible, as being in the nature of an inquisition on a public matter. *Carr v. Mostyn*, 5 Exch. 69.

PARTIES.—Joint contract—New trial.—The plaintiff, acting on behalf of the members of an orchestra to which he himself belonged, signed a proposal, “on behalf of the members of the orchestra,” to continue their services, provided the defendant would guarantee certain salary then due to them. The defendant accepted this proposition, but failed to pay the salary due. The plaintiff alone brought an action, for the whole money due to himself and the rest, and stated the contract to be with himself and the rest. The jury found that he acted on behalf of himself as well as the rest: Held, that the contract was joint, and that he could not recover. The judge, at the trial, offered the plaintiff’s counsel leave to amend, which was refused by him, owing to the strong opinion expressed by the judge that the contract was a joint contract: Held, no ground for a new trial. *Lucas v. Beale*, 20 Law J. (N. S.) C. B. 134.

PATENT.—1. Infringement—Evidence.—A claim for patent for improvements in the mode of doing anything by a known process, is sufficient to entitle the claimant to a patent for his improvements, when applied either to the process altered and improved by discoveries subsequently published, so long as it remains the same with regard to the

improvements claimed, and their application. A declaration in case for the infringement of a patent, "for improvements in giving signals and sounding alarms in distant places by means of electric currents transmitted through metallic circuits," alleged that the defendant had used "the said invention." The specification of the patent made nine several claims in respect of different improvements. The jury having found an infringement in respect of one of such improvements, that was held to be a sufficient finding of the infringement alleged in the declaration. The title of the patent, and every part of the specification in which directions were given for putting the apparatus in use, mentioned "metallic circuits" as the means by which the electric current was to be conveyed, but no claim was made in respect of such circuits. At the time of the patent it was not known, but it was subsequently discovered, that the earth might be used to complete the circuit to an extent of almost one-half the circuit, and that metal might be dispensed with to that extent, and the defendants had always used this new discovery: Held, nevertheless, that the defendants, having been found by the jury to have adopted a part of the plaintiff's invention, the patent had been infringed. The jury found that "the sending of signals to intermediate stations was a new invention of the patentees, and had been adopted by the defendants." There was a distinct claim in the specification for this improvement, and the method of carrying it into effect was pointed out: Held, that this was the proper subject of a patent, and that the idea and method being obvious and simple did not make any difference, and that the plaintiffs were entitled to a verdict in respect of such finding, although, by the defendants' method, signals were sent from as well as to intermediate stations. The plaintiffs' system was worked by six wires, but no specific claim was made to any particular system of making signals; the defendants used only one wire, and made the signals in a different manner by counting repeated deflexions of the needle: Held, that a finding of the jury, "that as a whole the system of counting with one wire and two needles is not the same as the system of the plaintiffs" did not entitle the defendants to a verdict, the plaintiffs' claim not being to any particular system, but to the particular improvements pointed out in his specification. *Electric Telegraph Company v. Brett and Little*, 20 Law J. (N. S.) C. B. 123.

2. *Specification.*—In the specification of a patent for "improvements in looms for weaving" the plaintiff declared that his improvements applied to that class of machinery called power-looms, and consisted "in a novel arrangement of mechanism designed for the purpose of instantly stopping the whole of the working parts of the loom whenever the shuttle stops in the shed." He then described the manner in which that was done in ordinary looms, and proceeded thus, "the principal defect in this arrangement, and which my improvement is intended to obviate, is the frequent breakage of the different parts of the loom occasioned by the shock of the lathe or slay striking against the 'frog,' which is fixed to the framing; in my improved arrangement the loom is stopped in the following manner:

I make use of the 'swell' and the 'stop-rod' finger as usual; the construction of the latter however is somewhat modified, being of one piece with the small lever which bears against the 'swell,' but instead of its striking against a stop, or 'frog' fixed to the framing of the loom, it strikes against a stop or notch upon the upper end of a vertical lever, vibrating upon a pin or stud. The lever is furnished with a small roller or bowl, which acts against a projection on a horizontal lever, causing it to vibrate upon its centre, and throw a clutch box (which connects the main-driving pulley to the driving-shaft) out of gear, and allows the main driving-pulley to revolve loosely upon the driving-shaft, at the same time that a projection on the lever strikes against the spring handle and shifts the strap; simultaneously with these two movements the lower end of the vertical beam causes a break to be brought in contact with the fly-wheel of the loom, thus instantaneously stopping every motion of the loom, without the slightest shock." After the date of the plaintiff's patent the defendant obtained a patent for "improvements in and applicable to looms for weaving, and amongst them he claimed a novel arrangement of apparatus for throwing the loom out of gear when the shuttle failed to complete its course." In the defendant's apparatus the clutch-box was not used, but instead of it, the stop-rod finger acted on a loose piece or sliding frog; and instead of a rigid vertical lever, as in plaintiff's machine, the defendant used an elastic horizontal lever, and by reason of the pin travelling on an incline plane, the break was applied to the wheel gradually, and not simultaneously. The jury found that the plaintiff's arrangement of machinery for stopping looms, by means of the action of the clutch-box, in combination with the action of the break, was new and useful; also, that the plaintiff's arrangement of machinery for bringing the break into connection with the fly-wheel was new and useful; and that the defendant's arrangement of machinery for the latter purpose was substantially the same as the plaintiff's: Held, upon these findings, first, that the specification was good; secondly, that the defendant had infringed the patent. *Sellers v. Dickinson*, 5 Exch. 312.

PAYMENT OF MONEY INTO COURT.—*Effect of in tort.*—Payment into court in tort has the same effect as payment into court in actions of indebitatus assumpsit, namely, that of admitting a cause of action, with damages, amounting to the sum paid into court. *Story v. Finnis*, 20 Law J. (N. S.) Exch. 144.

PERJURY.—1. *Arbitrator.*—A., a defendant in a suit, tried before a county court judge, gave false evidence before an arbitrator to whom the suit was referred, and before whom A. was sworn: Held, that under stat. 9 & 10 Vict, c. 95, s. 77, the arbitrator had no authority to administer on oath, and therefore A. was not liable to be indicted for injury. *Reg. v. Hallett*, 2 Cr. Cas. 237.

2. *Identity.*—Indictment for perjury: Held to contain sufficient averments of the identity of the party respecting whom the perjury was committed. *Reg. v. Bennett*, 2 Cr. Cas. 240.

PLEADING.—1. To a plea of set-off in debt on simple contract the plaintiff replied as to 49*l.* 16*s.* 10*d.* parcel of the debt, that the causes of set-off, so far as the same related to 49*l.* 16*s.* 10*d.*, did not accrue within six years, concluding with a verification; and, as to the residue of the causes of action, the plaintiff says that he was not nor is indebted *modo et forma*, concluding to the country: Held, on special demurrer, that the replication was bad. The plaintiff should in such case reply that part of the subject-matter of the set-off is barred by the statute, and that he is not indebted to the defendant in any sum which (excluding the part so barred) equals the amount of the plaintiff's demand. *Mead v. Bashford*, 5 Exch. 336.

2. *Accord and satisfaction.*—A plea to the further maintenance of an action on the case stated, that it was agreed between the plaintiffs and the defendants that the defendants should do certain things, and that the action and causes of action included in the same should be settled, satisfied, discharged and terminated by the arrangement and agreement before mentioned. The plea then averred performance, by the defendants, of some of the things, and readiness and willingness to perform the others: Held, that the plea was bad, as it did not distinctly aver that the plaintiffs accepted the agreement in satisfaction and discharge of the causes of action. *Hall v. Flocton*, 20 Law J. (N. S.) Q. B. 208.

3. *Argumentativeness.*—In an action on the indebitatus counts, the defendant pleaded that the debt was due for certain hops bargained and sold, that the plaintiff produced a sample at the bargain and sale, and promised to deliver the hops equal in quality and description to the sample, and that the hops were not equal in quality and description; wherefore the defendant refused to accept them, and broke his promise. On special demurrer the plea was held bad, as amounting to the general issue. *Semble*, that on a sale of specific goods, with a warranty that they correspond to a sample, the vendee cannot refuse to receive them on account of their not corresponding, without an express condition to that effect; but that he is left to bring his cross action, or to avail himself of the breach of warranty in reduction of damages in an action for the price. (Commenting on *Street v. Blay*, 2 B. & Ad. 456.) The declaration claimed 1000*l.* for goods sold and delivered, goods bargained and sold, and on an account stated. The plea, pleaded as to 191*l.*, parcel, &c., averred that the debt to that amount was for goods bargained and sold. *Quære*, whether the plea would not have been bad, on special demurrer, for attempting to limit the plaintiff in his proof as to the sum of 191*l.* *Dawson v. Collis*, 20 L. J. (N. S.) C. B. 116.

4. *Costs—Action for debt—Separate pleas—Payment into court.*—Debt for work and labour. Pleas, first, except as to 10*l.*, parcel, &c., never indebted; secondly, as to 10*l.*, other parcel, &c., payment; thirdly, as to 10*l.*, excepted, payment into court of 10*l.* 1*s.*, in full satisfaction of the said sum of 10*l.* and damages by reason of its non-payment. Replications, joining issue on the first plea; traversing the payment alleged in the second plea; and to the third plea,

that the plaintiff accepted and took out of court the amount paid in, in satisfaction of the causes of action in that plea alleged, and prayed judgment for his costs in that respect. A verdict was found for the plaintiff, on the plea of never indebted, for 10*l.* beyond the sum paid into court, and for the defendant on the second plea: Held, that the plaintiff was entitled, under Reg. Gen. Trin. Term, 1 Vict. to have allowed him on taxation all his costs of suit in respect of the cause of action to which the plea of payment into court had been pleaded, including the costs of the replication to that plea. *Rumbelow v. Whalley*, 20 L. J. (N. S.) Q. B. 262.

5. *Declaration—Express promise—Good consideration.*—Declaration stated that heretofore, to wit, &c., in consideration that the plaintiff then, through placing confidence in the defendants, that they were then acting fairly by the plaintiff in then recommending the plaintiff to purchase of the defendants, on their recommendation, 211 pockets of hops, at 63*s.* the cwt., the defendants promised the plaintiff that they were not then abusing the said confidence of the plaintiff, in recommending the purchase at the said price; that the plaintiff, relying on the said promise, did then, to wit, on the day and year aforesaid, through placing confidence in the defendants that they were at the time of the said promise acting fairly by the plaintiff in then recommending him to purchase at the said price. The declaration then alleged that the defendants broke their said promise in this, that at the time of making it they were abusing the plaintiff's confidence in this, that at the time of their said recommendation the hops were worth only 50*s.* the cwt., as the defendants then well knew, by means whereof the plaintiff had sustained damage, &c.: Held, on motion in arrest of judgment, that the declaration disclosed a good consideration for the defendants' express promise. *West v. Jackson*, 20 L. J. (N. S.) Q. B. 241.

6. *General issue.*—A plea that the promise sued upon was a promise to answer for the debt of another person, and that there was no agreement, or memorandum or note thereof in writing, and signed by the defendant, is bad, as amounting to the general issue. *Reed v. Lamb*, 20 L. J. (N. S.) Exch. 161.

7. *Payment to one of two trustees.*—To debt upon bond, the defendant pleaded as to part, payment in satisfaction, post diem, under 4 & 5 Anne, c. 16, s. 12. Payment to one of two trustees binds both. *Husband v. Davis*, 20 L. J. (N. S.) C. B. 118.

8. *Time and amount—Hire.*—When a contract is alleged in pleading to have been for a certain time or amount, it is sufficient to prove that some specific time or amount was agreed upon, and it is not necessary to prove the precise time or amount laid under a videlicet. The declaration stated that the plaintiff promised to hire horses from the defendant, and employ them for a certain space of time, to wit, for the space of one year, and to pay the plaintiff for the use thereof certain hire and reward, to wit, 50*l.* a year for each of the horses, payable quarterly: Held, that the allegations after the videlicet were immaterial; that although it was proved that the

hiring was for a week, and from week to week, at the hire of 50l. a year for each horse, payable weekly, there was no fatal variance; that the words "hire and reward," include time as well as amount, and therefore the words "payable quarterly" were covered by the *videlicet* as well as the sum. *Harris v. Phillips*, 20 L. J. (N. S.) C. B. 12.

9. *Trover*.—The plea of not guilty in trover puts in issue not merely the conversion in fact, but the wrongful conversion. The case of *Satincliffe v. Hardwicke*, 2 Cr. M. & R. 1; S. C. 4 Law J. Rep. (N. S.) Exch. 161, is in that respect overruled. In trover for furniture by the assignees of a bankrupt, the defendant justified the seizure under a judgment and execution against the goods of the bankrupt before his bankruptcy: Held, on demurrer, that the plea was bad, as amounting to not guilty. *Young and others, assignees of Robinson, v. Cooper*, 20 L. J. (N. S.) Exch. 136.

POWER OF APPOINTMENT.—*General or limited to children*.—M. B. being seised in fee of certain premises, and also possessed of certain stock, by settlement prior to her marriage with J. C., assigned the said stock in trust after marriage for her separate use, or such person or persons as she should by deed appoint, and conveyed her said real property in trust for herself, until her marriage with J. C., and then to her separate use during their joint lives, and after her decease to the use of her husband, J. C., for life, and after his death, to the use of the child and children of the said M. B. by the said J. C., or other person or persons, and of such estate, and subject to such powers and provisos as the said M. B. should, notwithstanding her said intended coverture, by deed appoint: Held, that the power of appointment could only be exercised in favour of the child or children of M. B. by J. C., or other after-taken husband. *Doe d. Beech v. Hall*, 20 L. J. (N. S.) Exch. 161.

PRACTICE.—1. *Amendment of declaration after trial*.—The plaintiff, a customer of a banking firm, having brought an action against the firm, was nonsuited on the ground that two of the defendants were not members of the firm at the time of the accruing of the cause of action. Negotiation on the subject of the action had been going on for several years, during which the defendants had not questioned their liability to be sued, and in a bill in equity filed by them against the plaintiff after pleading, and before trial, had stated that the liabilities of the previous firm had been transferred to themselves, and further stated who the members of the firm were when the cause of action accrued. The court, to prevent the operation of the Statute of Limitations, set aside the nonsuit, and gave the plaintiff leave to amend the declaration, by striking out the two defendants who had been erroneously included in the action. *Cramford v. Cocks and others*, 20 Law J. (N. S.) Exch. 169.

2. *Plea puis darrein continuance*.—*Withdrawal of*.—To an action on a recognizance of bail, the defendant pleaded, first, no record of such recognizance; secondly, no writ of *ca. sa.*; and thirdly, pay-

ment. The plaintiff having obtained judgment on the first two pleas, the issue of the third came on for trial at nisi prius, when the defendant tendered a plea puis darrein continuance, which was accepted by the judge, and the jury discharged from trying the issue joined: Held, that the plea puis darrein continuance was properly received, as it was a waiver of those pleas which only remained to be tried. *Wagner v. Imbrie*, 20 Law J. (N. S.) Exch. 235.

3. *Witness—Competency of creditor—Misdirection on collateral points.*—A creditor, who is a party to a deed of assignment by his debtor to a trustee for creditors, is a competent witness for the trustee in an action to enforce the deed. Where a judge, in summing up to the jury, mistakes the law upon a collateral point, upon which a bill of exceptions would not lie, a new trial will not be granted as of right; but the court will exercise its discretion according to its opinion of the result being in accordance with the justice of the case. *Black v. Jones*, 20 Law J. (N. S.) Exch. 152.

And see VARIANCE.

PRINCIPAL AND AGENT.—1. *Assumpsit on charter-party.*—Declaration on a charter-party, alleging it to be made “between the defendant, therein described as the owner of the good ship or vessel called, &c. of the one part, and the plaintiff, merchant and freighter, of the other part.” The defendant pleaded non-assumpsit. The charter-party, produced at the trial, was expressed to be made between the defendant of the one part, and the plaintiff, as “agent of the freighter,” of the other part, and amongst other things stipulated that, “being concluded on behalf of another party, it is agreed that all responsibility on the part of S. (the plaintiff) cease as soon as the cargo is shipped.” No principal was named in the charter-party, and it appeared from other evidence that the plaintiff was in point of fact himself the real freighter, and not merely an agent in the matter: Held, that the plaintiff was entitled to sue as principal for a breach of the charter-party, notwithstanding that he had contracted as agent; and that the above stipulation, applying only to his character of agent, had not the effect of limiting his responsibility as principal. *Schmalz v. Avery*, 20 Law J. (N. S.) Q. B. 228.

2. *Ship—Bill of lading.*—The master of a ship has no general authority from the owner to sign bills of lading for goods not received on board; and all persons taking a bill of lading by indorsement or otherwise have notice that his authority is limited to signing bills of lading for goods received on board. Therefore where a bill of lading, signed by the master in the usual form, but for goods which were never received on board, had to be deposited, according to the custom of merchants, with the plaintiffs by the parties to whom the master had delivered it, as a security for advances from the plaintiffs to them, and had been indorsed by them to the plaintiffs, together with a bill of exchange drawn by them, and afterwards dishonoured owing to the non-delivery of the goods mentioned in the bill of lading: it was held, that the plaintiffs could not recover, in an action on the case against the owners of the ship, the amount of which the bill of

lading, if true, would have been a good security. *Grant v. Norway*, 20 Law J. (N. S.) C. B. 93.

PRINCIPAL AND SURETY.—*Rate of interest—Damages.*—Where the grantor of an annuity had covenanted with his surety to pay the annuity, but had failed to do so, and the surety had in consequence been compelled to make the payments of the annuity as they fell due: Held, that in an action on the covenant by the surety against the grantor, the jury were at liberty to award as damages for the breach of covenant, not only the amount of the principal sums so paid, but also interest on such principal sums; and that as the grantor had stated an account allowing interest on some previous payments, at the rate of 5*l.* per cent., the jury were on this occasion at liberty, if they pleased, to calculate the interest at the same rate. *Petre v. Duncombe*, 20 Law J. (N. S.) Q. B. 242.

PRISONER.—The defendant was taken in execution upon a *ca. sa.* at the suit of the plaintiff in June, 1841. In August in the same year, the plaintiff left England, and was shortly afterwards seen at St. Petersburg, but had never been heard of since. Upon an affidavit of these facts, and showing reasonable ground to induce them to believe that the plaintiff was dead, and alleging that proper search had been made, and no trace of a will or grant of administration found, the court (in 1849) ordered the defendant to be discharged from custody, without regard to any supposed lien of the attorney of costs. *Camp v. Pote*, 8 C. B. 375.

PRODUCTION OF STAMPED COPY AT TRIAL WHERE ORIGINAL IS LOST.—In an action founded upon a document, in which both parties have an interest, and which was in the possession of one, but is said by him to have been lost, a judge cannot order that, if such party does not produce the document to be stamped, a copy duly stamped shall be read in evidence at the trial: and that the original shall not then be produced on the other side, nor objection taken to the want of a stamp on the original. The court rescinded such an order, after it had been enforced by the judge at *nisi prius*, and made a rule of court. *Rankin v. Hamilton*, 15 Q. B. 187.

PROMISSORY NOTE.—1. If one of two makers of a joint and several promissory note gives the holder a deed of mortgage to secure the amount, with a covenant to pay it, the other maker is not thereby discharged; for the remedy on the specialty is not co-extensive with the remedy on the note. *Ansell v. Baker*, 15 Q. B. 20.

2. A note payable to the order of the maker, and by him indorsed in blank, may be treated as a note payable to bearer; and that notwithstanding there is a memorandum at the foot of the note indicating a particular place of payment. *Masters v. Baretto*, 8 C. B. 433.

3. The defendant, a director and shareholder in a joint-stock company, together with three others, made the following promissory note:—"We, the directors of the Royal Bank of Australia, for ourselves

and the other shareholders of this company, jointly and severally promise to pay to H. W. or bearer, on, &c. the sum of, &c. for value received on account of the company. Signed, A. B., C. D., E. F., Directors." The defendant having been sued thereon in his individual character: Held, that the case did not fall within the Joint-Stock Companies Winding-up Act, 11 & 12 Vict. c. 45, s. 79; and that there was no ground for staying the action, until the plaintiff should have proved his debt before the Master appointed to wind up the affairs of the company. *Penkivil v. Connell*, 5 Exch. 381.

4. *Plea of no consideration.*—A plea to an action on a promissory note, alleging "that the note was given without consideration," and stating "that it was obtained from the defendant, upon a representation by the plaintiff that a sum of money was owing from the defendant to the plaintiff by virtue of an indenture, whereas no such sum was owing," is a good plea of no consideration, without alleging that the representation was "fraudulently" made, or that it was a representation of a matter of fact. Such a plea, with the addition of the word "fraudulently" in the statement of the misrepresentation, is sufficiently proved by a finding that the note was given upon the faith of an innocent misrepresentation of a matter of law by the plaintiff, and the word "fraudulently" may be rejected as surplusage. *Southall v. Rigg*, 20 Law J. (N. S.) C. B. 145.

RAILWAY.—1. *Compensation—Contingent damage—Injury to land—Flood waters.*—A railway company being about to construct their line over certain land of W. C., it was by agreement referred to an arbitrator to fix the amount of money paid by the company to W. C. as the price of the land to be purchased as well as for the injury done to his remaining estate, by severance or otherwise, and to determine what bridges, arches, culverts, &c. should be made. The arbitrator awarded 7,900*l.* as the amount of compensation, and directed what works should be constructed. The money was paid to W. C., and the works directed were done: Held, that this sum covered all damage known or contingent by reason of the construction of the railway on the lands purchased, and all other damage arising from the construction of the railway at other places, which was apparent and capable of being ascertained and estimated when the compensation was awarded, but that it did not include any contingent and possible damage which might arise afterwards by the works of the company at other places which could not have been foreseen by the arbitrator. A railway was constructed across certain low lands adjoining the river D., over which the flood waters of that river used to spread themselves. These low lands were separated from the plaintiff's lands by a bank constructed under certain drainage acts which protected the plaintiff's lands from floods. By the construction of the railway without sufficient openings the flood waters could not spread themselves as formerly, but were penned up and flowed over the bank upon the plaintiff's lands. There was no express clause in their act obliging the railway company to make openings for flood waters in that district, but there was a general

provision that they should make openings when the railway crossed any public drains, embankments or works in any drainage district: Held, that although they might not be compellable by mandamus to make openings for the flood waters in that district, yet that an action would lie against the company for the injury to plaintiff's lands. *Lawrence v. Great Northern Railway Company*, 20 Law J. (N. S.) Q. B. 293.

2. 5 & 6 Vict. c. 55.—A railway company is, under 5 & 6 Vict. c. 55, s. 9, bound to keep the gates at the ends of level crossings closed against all persons or cattle upon the highway, whether lawfully there or not, and they are liable to any injury arising from a breach of that duty. In an action on the case against a railway company for not keeping gates closed across the ends of a highway which crossed the railway upon a level, pursuant to 5 & 6 Vict. c. 55, s. 9, whereby two horses of the plaintiff, "then lawfully being on the said highway, strayed upon the railway and were killed," the defendants traversed that the horses were lawfully on the highway. It appeared that the horses having been put into a field of the plaintiff's, the fences of which were sufficiently sound for ordinary purposes, had accidentally escaped and got into a public road, and thence along the highway through the gate upon the line of the railway: Held, that as against the company the horses were lawfully upon the highway. *Quære*, whether the horses could, under these circumstances, have been distrained by the owner of the soil of the highway or impounded by the surveyor. *Fawcett v. York and North Midland Railway Company*, 20 Law J. (N. S.) Q. B. 222.

3. *Lands Clauses Consolidation Act*—8 Vict. c. 18, s. 85.—Under section 39 of the Lands Clauses Consolidation Act, the promoters of a railway company may properly issue their warrant to summon a compensation jury to the sheriff of the county where the lands are situated, although the under-sheriff be interested as a shareholder in the company. In such a case, the sheriff should either take the inquisition in person or appoint some disinterested deputy. Where the promoters of a railway company have entered upon and taken land under the provisions of section 85 of the Lands Clauses Consolidation Act within the period prescribed for exercising their compulsory powers, their continuance in possession after that period without making compensation to the owner of the land does not render their original entry unlawful. In an action for injury to land, the defendants (a railway company) pleaded that they entered on the plaintiff's land under section 85 of the Lands Clauses Consolidation Act, before the expiration of the prescribed period, continued in possession, and in the due and lawful exercise of the powers of the said act committed the grievances complained of. The plaintiff replied (admitting the statute) *de injuriâ absque residuo causæ*: Held, that the replication was bad, as the plea claimed an interest in land, and the replication traversed an authority in law by the denial of acting under the statute. *Worsley v. South Devon Railway Company*, 20 Law J. (N. S.) Q. B. 254.

4. Lands Clauses Consolidation Act—8 Vict. c. 18, s. 85—Compulsory powers—Limits of deviation.—The ascertaining the amount of compensation, after lands have been entered upon and taken under section 85 of the Lands Clauses Consolidation Act, is no exercise of a compulsory power on the part of the company. Section 68 applies to the case of lands entered upon and used under section 85, and the landowner is in such case bound to initiate proceedings for settling the compensation. Where a railway company have complied with the provisions of section 85, and have entered upon and taken land within the prescribed period for exercising their compulsory powers, their continuance in possession after the prescribed period, without having the compensation assessed and the land conveyed to them, is not unlawful, and an ejectment cannot be maintained against them under such circumstances. A. was the owner of a field, the whole of which was contained in the books of reference of a railway company, but fifteen perches of it lay beyond the limits of deviation laid down in the plans. The Company served a notice upon A. requiring part of the field for the purpose of the railway. A. then gave notice to the company that if they took part they must take the whole, to which they agreed. A. afterwards receded from his notice. The company then entered upon the whole, under section 85 of the Lands Clauses Consolidation Act: Held, that the question whether the fifteen perches were necessary for the works was for the jury, and also that A., having required the company to take the whole, could not object that their entry on that portion was unlawful. The expression "deviation" in 8 Vict. c. 20, s. 15, is used with reference to the medium filum of the railway as laid down in the parliamentary plans. *Doe d. Armistead v. The North Staffordshire Railway Company*, 20 Law J. (N. S.) Q. B. 249.

RAILWAY ACT.—Condition precedent—Power to make calls—Power to take lands.—The 22nd sect. of the Waterford, Wexford, &c., Railway Act, enacts, that when 1,500,000*l.* shall have been subscribed it shall be lawful for the company to put in force all the powers of the act, and of the acts therein recited, as regards that portion of the said railway situate, &c.: Held, that the raising of this sum was not a condition precedent to the power of the company to make calls, but only to their exercising the compulsory powers of taking lands, &c. *Waterford, Wexford, Wicklow and Dublin Railway Company v. Dalbiac*, 20 Law J. (N. S.) Exch. 227.

RAILWAY COMPANY.—Covenant for compensation—Construction of.—The declaration stated that the defendants were provisional directors of a certain company of, and promoters of a bill in parliament for making a railway from E. to P., and that by articles of agreement between them and the plaintiff it was witnessed, that in consideration of the covenants thereafter contained the plaintiff covenanted that he would accede to the bill, and the defendants covenanted that in the event of the bill passing into a law the company should pay him for so much of his land as should be intersected by

the railway at the rate of 120*l.* per acre; and, secondly, that they should pay him 3000*l.* in full compensation for the general damage which the railway might do to the mansion, park and estate, including the crossing of the road near the park entrance, the lowering the road, the obstruction of views, disturbance of privacy of the park, &c., the expense of temporary residence during the progress of the works, the depreciation as a residence, the additional expense in the cultivation of farms by the alteration of the road, and all other damage to be done to the mansion and park. Averment, that the plaintiff did assent to the bill, and the same passed into a law; that the company entered on the plaintiff's lands and cut down trees, &c., and although twenty-seven acres were intersected and severed by the railway, and the park and mansion deteriorated, yet neither the company nor the defendants had paid the plaintiff 120*l.* per acre, nor the 3000*l.* Fourth plea, that the company did not enter on the plaintiff's land. Fifth, that the quantity of the plaintiff's land intersected by the railway was not required by the company for the purposes of the railway, nor was it severed from the remainder of the fields: Held, per Parke B. and Platt B., that the defendants were bound by their covenant to pay the plaintiff the sum of 3000*l.* immediately after the passing of the act, although the railway had not been constructed, nor any damage done to the plaintiff's land; dissentiente Pollock, C. B., who held that the plaintiff was not entitled to the 3000*l.* until his land should have been taken or some damage done. *Bland v. Crowley*, 20 Law J. (N. S.) Exch. 218.

RECEIVING.—On the trial of an indictment containing counts for stealing, and for receiving the property of A. knowing it to be stolen, evidence of the possession by the prisoner of other property stolen from other persons at other times, is not admissible to prove either the stealing or the receiving. *Reg. v. George*, 2 Cr. Cas. 264.

REPLEVIN.—*Court baron of the honour of Pontefract.*—The court baron of the honour of Pontefract was an immemorial court, and the lord had power to grant replevins and hold pleas in replevin, and also to hold pleas in all personal actions arising within the jurisdiction up to 40*s.* By the 17 Geo. 3, c. 15, the jurisdiction was extended to 5*l.*, but there was a proviso that all plaintiffs in replevin should be had and be proceeded in, and be removable in the same manner, as if the act had not passed. By the 2 & 3 Vict. c. 85, s. 1, after reciting the 17 Geo. 3, c. 15, it was enacted, that “the present jurisdiction and practice of the court baron of the honour of Pontefract shall (with certain exceptions) cease and determine; and thenceforth the said court shall be constituted and be a court of record under the name of the court of the honour of Pontefract. The 4th section extended the jurisdiction of the court to 15*l.* The 56th section enacted that, six months after the passing of any general act for the recovery of small debts, the operation of which should interfere with the power given to the said court by this act, “every clause, matter or thing in the act contained which shall extend or be construed to extend to give

to the court hereby appointed any local or separate jurisdiction shall cease and determine." The act did not specifically mention replevins. By the 9 & 10 Vict. c. 95, s. 5, (the County Courts Act,) power was given to the Queen in Council to order that any court holden for the recovery of debts under the provisions of certain acts, specified in schedules A. and B., should be held as a county court, with power to alter or vary the districts; and it provided, "that from and after the time mentioned in any such orders, the act or acts under which such court is now constituted, as far as the same relate to the establishment or jurisdiction or practice of a court for the recovery of small debts or demands, shall be repealed, but not so as to revive any act thereby repealed;" and the 6th section enacted, that as soon as a court should be established under the aforesaid powers, "every act of parliament heretofore passed, so far as the same respectively relate to or affect the jurisdiction and practice of the court so established, or ordered to be holden as a county court, shall be repealed." By the 119th and 120th sections, actions of replevin are directed to be brought without writ in the courts held under the act, and the plaintiffs are to be entered in the court holden for the district. The 2 & 3 Vict. c. 85, was specified in schedule A., and an order was duly made establishing a county court for the district included within the jurisdiction of the court of the honour of Pontefract, as modified by that act. The defendant, being the landlord of certain premises occupied by the plaintiff, seized as a distress for rent certain cotton spinning machines, which were fixed by screws, some into the wooden floor, and some into lead, which had been poured in a melted state into holes in the stone for the purpose of receiving the screws. The machines having been replevied by a replevin issued out of the honour court of Pontefract, the defendant entered and seized them a second time: Held, first, in the absence of evidence that any replevins had been issued from the court baron of the honour of Pontefract, except in cases where there was jurisdiction to try the plaintiffs, that after the constitution of the new county courts no replevin could be issued from the court baron. *Semble*, there may be a franchise of granting replevins independently of the franchise of trying the plaintiffs. Held, secondly, that the machines never became part of the freehold, and were distrainable. *Hellawell v. Eastwood*, 20 Law J. (N. S.) Exch. 154.

REVENUE.—*Customs Acts.*—The owner of a vessel who knowingly lets his vessel that it may be employed in a smuggling adventure, and the cargo of which is unshipped without the duties being paid, is liable to the penalties under the 8 & 9 Vict. c. 87, s. 46, as a person "concerned" in the illegal unshipping of the goods. *Attorney-General v. Robson*, 20 Law J. (N. S.) Exch. 188.

SCIRE FACIAS.—*Pleading — Joint-stock company.*—Scire facias against a member of a company completely registered under the Joint-Stock Companies Act, 7 & 8 Vict. c. 110, to obtain satisfaction of a judgment and execution against the company, the plaintiff having failed to obtain satisfaction of the said judgment by execution

against the property and effects of the company, concluding with a verification. Secondly, that no rule or order of the court or a judge had been obtained for leave to issue the scire facias. Replication to the first plea, that due diligence was used to obtain satisfaction by execution against the property of the company, concluding to the country: Held, upon demurrer, that the 68th section of the 7 & 8 Vict. c. 110, was cumulative only, and did not preclude the plaintiff from proceeding by scire facias to obtain satisfaction of his judgment from the defendant under the 66th section. Held, also, as to the pleadings, first, that the second plea was bad; secondly, that the replication was sufficient, and properly concluded to the country. *Marson v. Lund*, 20 Law J. (N. S.) Q. B. 190.

SET-OFF.—*Payment after action brought—Nominal damages.*—Where the plaintiff at the trial proved a debt of 11*l.* 18*s.* 1*d.*, and the defendant established a defence under one plea as to 18*s.*, under a set-off as to 7*l.* 8*s.*, and also a payment of 4*l.* after the commencement of the suit, thus affording an answer to the whole of the plaintiff's demand: Held, that the payment having been made after the commencement of the suit, the plaintiff was entitled to a verdict, with nominal damages, on the plea of set-off. *Spradbery v. Gillam*, 20 Law J. (N. S.) Exch. 237.

And see PLEADING.

SHIP.—*Time of sailing.*—The plaintiff, who resided in Ireland, having applied to the defendants' emigration agents in London respecting a passage for himself and family on board their ships to Australia, received in answer a letter in which they agreed to convey him and his family for 65*l.* This letter was written on the fly-sheet of a printed circular headed "Emigration to Australia," and which (inter alia) stated that ships "will be despatched on the appointed days (wind and weather permitting) for which written guarantees will be given." Then followed a list of ships, amongst which the "Asiatic" was named as to sail from London on the 15th of August and from Plymouth on the 25th. In another part of the circular it was stated:—"Passengers from Ireland can readily join at Plymouth. A deposit of one-half the passage-money to be paid at the time the berths are engaged, the balance to be paid prior to granting the embarkation order." The plaintiff engaged a berth on board the "Asiatic," and paid the defendants 32*l.* 10*s.* as a deposit, but no written guarantee was given. The "Asiatic" did not arrive at Plymouth until the 3rd of September, although not prevented by wind and weather. The plaintiff's berth was kept vacant from London to Plymouth: Held, that the statement in the circular was not a mere representation, but a warranty, that the "Asiatic" would sail on the days appointed; and that as she did not the plaintiff was justified in taking a passage on board another vessel, and was entitled to recover from the defendants the amount of the deposit and the expenses he had been put to by the delay at Plymouth. *Cranston v. Marshall*, 5 Exch. 395.

SLANDER.—1. *Charge of felony.*—A declaration in slander, after stating as inducement that the defendant intended to impute felony to the plaintiff, set out the slanderous words as follows:—"I (the defendant) have a suspicion that you (the plaintiff) and B. have robbed my house (meaning thereby that the plaintiff had feloniously stolen certain goods of the defendant), and therefore I take you into custody:" Held, that the judge rightly directed the jury in stating the question to be whether the defendant meant to impute an absolute charge of felony or only a suspicion of felony, and that if the jury believed the latter the verdict ought to be for the defendant. *Tozer v. Mashford*, 20 Law J. (N. S.) Exch. 225.

2. *Privileged communication—Evidence of malice.*—A communication made bona fide in performance of a duty, or with a fair and reasonable purpose of protecting the interest of the party making it, is privileged, and the onus of proving malice lies on the plaintiff. Before the question of malice can be submitted to the jury, the evidence must raise a probability of malice, and be more consistent with its existence than with its nonexistence. The plaintiff who had been discharged on a charge of theft from the defendant's service afterwards came to the defendant's house to receive wages due to him, and then had some communication with the defendant's servants, when the defendant said to his servants, "I have dismissed that man for robbing me, do not speak to him any more in public or in private, or I shall think you as bad as him:" Held, first, that this was a privileged communication; secondly, that there was no evidence of malice to go to the jury. *Sommervill v. Hawkins*, 20 Law J. (N. S.) C. B. 131.

STAMP ACT.—55 Geo. 3, c. 185.—An assignment of a policy of assurance as security for a debt, with a proviso for redemption on payment, is a mortgage within the 55 Geo. 3, c. 184, sched. pt. 1, and therefore requires an ad valorem stamp. *Caldwell v. Dawson*, 5 Exch. 1.

STATUTE.—1. *Contract—Mandamus.*—Where commissioners under a local act have power to appoint officers at a salary to be paid out of the rates raised, the appointment does not create a contract on the part of the commissioners to pay the salary. Therefore an indebitatus action will not lie against them for salary, but a mandamus or an action on the case is the proper remedy. *Bogg v. Pearse*, 20 Law J. (N. S.) C. B. 99.

2. *Construction of—34 Geo. 3, c. xcvi.*—*Order of justices, validity of.*—The 34 Geo. 3, c. xcvi., an act for building a new shire hall for the county of Stafford, enacted (sect. 31), that when the said shire hall should be completed, it should be for ever insured, supported and maintained at the expense of the county of Stafford and the town of Stafford, in the proportions following: that one-tenth part of the charges should be paid by the mayor, aldermen, &c. of Stafford, and the remainder by the inhabitants of the county; that it should be lawful for the county justices to order the shire hall to be insured, supported, maintained and repaired as they should think fit, and they

should and might order the expenses of the insurance and repairs to be paid in the proportions aforementioned. After the completion of the hall the sum of 1000*l.* was, in pursuance of the act and of an order of county justices, expended in insuring and supporting the hall, and a tenth part thereof ordered to be paid by the mayor, &c. of Stafford, and the remainder by the inhabitants of the county. Subsequently a further sum of 28*l.* 2*s.* was ordered by the county justices to be laid out in repairing the hall, and a tenth part of that sum was ordered to be paid by the mayor, &c., and the remainder by the inhabitants of the county: Held, first, that the mayor, &c. were bound to pay their proportion of the 1000*l.* actually expended, although they had not been summoned to oppose the order of justices, nor had any notice that it was about to be made; and secondly, that they were bound to pay their proportion of the sum of 28*l.* 2*s.*, although that sum had not been expended before the action. *Hinckley v. Mayor, Aldermen and Burgesses of Stafford*, 20 L. J. (N. S.) Exch. 171.

STATUTE OF LIMITATIONS. See PRACTICE AND PLEADING.

TRIAL.—*Special jury.*—A special jury cause having commenced, it was discovered that there were thirteen jurymen in the box, whereupon the judge adjourned the cause, and being unable to discover which jurymen was last called, discharged the whole jury and recalled twelve of them, by whom the cause was tried: Held, that this course was regular, and that there was no mistrial. Per Parke, B., if the jurymen last called could have been discovered, the proper course would have been to have discharged him. *Muirhead v. Evans*, 20 L. J. (N. S.) Exch. 211.

TROVER.—*Deposit of goods—Execution.*—Judgment having been obtained against the plaintiff in 1844, he executed a bill of sale of his plate to M., to defeat the execution. M. afterwards took an assignment of the judgment, and in 1848 issued an execution against the plaintiff and seized his goods, whereupon the latter, for the purpose of defeating the execution of M., deposited the plate with the defendant: Held, in an action of trover for the plate, that the defendant was entitled to set up the right of M. to it. *Seemle*, that where property pledged to which the pledgor has no title, and which he has no right to pledge, the pledgee is bound to return it to the true owner; his undertaking, in the absence of a special contract to the contrary, being, that he will return it to the pledgor, provided it turns out not to be the property of another. *Cheesman v. Excell*, 20 Law J. (N. S.) Exch. 209.

USURY.—12 *Anne*, stat. 2, c. 16—*Policy of assurance.*—Sir J. O. being much indebted, conveyed by indenture to trustees all his life-interest in an estate, in trust, without the necessity of his consent, to convey the same to certain creditors. By another indenture of the 1st of July, 1823, between the trustees, Sir J. O., and the creditors, it was agreed that the trustees should hold the rents to pay annuities, and to divide the rents into two shares proportionate to

the amount of the debts specified in two schedules to the deed, the portion appropriated to the first schedule to be paid to the creditors specified in that schedule equally in discharge of their debts, and after satisfying the debts and interest as to the shares appropriated to such creditors to apply a competent sum in effecting and keeping on foot policies on the life of Sir J. O., provided that any addition by way of bonus to the sums assured should belong to the creditors in the second schedule in addition to their debts, and be divided in proportion to their debts, notwithstanding that the principal and interest thereon might be discharged; and in consideration thereof all the creditors gave to Sir J. O. leave to live anywhere, without molestation to his person or goods by them, provided that if any creditor should molest him, his debt should be considered as released, and that Sir J. O. might plead such release in bar to any action. The trustees accordingly effected assurances, and after the death of Sir J. O. received the sum assured and also a bonus, the whole of which was claimed by Lady O., the widow, on the ground of the transaction having been usurious as to the creditors in the second schedule: Held, first, that the indenture of the 1st of July was not void for usury as to the provisions for the creditors in the first schedule. *Semble*, that the licence to Sir J. O. was not a licence for hearing of the debt within the meaning of 12 Anne, st. 2, c. 16, but was a relinquishment of his personal liability; and held, secondly, that the indenture was not void for usury as to the provision for creditors in the second schedule, nor was it in any respect void for usury; held, also, that no action at law would lie at the suit of Lady O. against the trustees, to recover either the balance unapplied or the sums received from the insurance office; nor would such action lie even if the transaction were usurious as to the creditors in the second schedule. *O'Brien v. Kenyon* (*Lord*), 20 Law J. (N. S.) Exch. 203.

UTTERING AND PUTTING OFF.—The indictment charged A. with having “uttered and put off” false coin: Held proved, although the coin was refused by the party to whom it was offered. *Reg. v. Welch*, 2 Cr. Cas. 78.

VARIANCE.—*Amendment*—3 & 4 Will. 4, c. 42, s. 23.—A declaration in assumpsit alleged that, in consideration that the plaintiff, at the request of the defendant, would make him such a number of acrometers as the defendant should from time to time require, and deliver the same when completed, the defendant would accept the same and pay for them. Breach, by not accepting part, completed according to order, and discharging the plaintiff from continuing the making of other part, commenced to be made according to order. It was proved that the original contract was an order to make 2000 acrometers, that 300 had been accepted, and the rest were in course of being made when the defendant discharged the plaintiff from completing them. The judge at nisi prius having allowed the declaration to be amended, the court refused to grant a new trial.

The parties having agreed to the terms of the amendment, and that it should be made after the trial was over on the same day, the amendment was not actually made until eight days after the trial, but in the terms agreed on, and before the following term: Held no ground for a new trial. The defendant's affidavits alleged that if the declaration had originally contained an allegation of an order for 2000 acrometers, he would have been prepared to show that such an order was absurd and impossible: Held insufficient to show that the defendant had been prejudiced in his defence, in the absence of any allegation, that 2000 acrometers had not in fact been ordered. *Jones v. Hutchinson*, 20 Law J. (N. S.) C. B. 114.

WATERCOURSE.—*Diversion of water—Mill.*—To an action by the plaintiff, as the occupier of a water grist mill, against the defendant, as owner of land on one side of the stream, for diverting part of the water for the irrigation of his tenant's meadows, the defendant pleaded, first, not guilty; fourthly, that his tenant possessed four closes on the bank of the stream above the mill; that the defendant, as the servant of his tenant, diverted small and reasonable quantities of water for irrigating the closes, which, excepting such a small quantity as was absorbed and used in irrigation, were returned to the stream above the mill; that the diversion was not continuous, but only intermittent; that the quantity of water absorbed and lost was very small and "inappreciable;" and that the diversion caused no damage to the plaintiff's mill. It was proved that the diversion was not continuous; that it took place when the stream was full, and that it caused no diminution of the water cognizable by the senses. The judge, in directing the jury, suggested that the word "inappreciable" might mean so inconsiderable as to be incapable of value or price. *Quære*, whether this was a misdirection. *Semble*, that assuming the word "inappreciable" to mean something incapable of being estimated or valued, the plea was not proved, and that rejecting that word, the verdict on that issue ought to have been found for the plaintiffs. Water is publici juris in this sense only, that all may reasonably use it who have the right of access to it. No man can have any property in the water itself, except in that particular portion which he may choose to abstract from the stream, and take into his own possession, and that during the time of his possession only. The proprietor of the adjacent land has the right to the usufruct of the streams that flow through it, not as an absolute and exclusive right to the flow of all the water in its natural state, but subject to the similar rights of all the proprietors of the banks on each side, with a reasonable enjoyment thereof. An action will lie for the unreasonable and unauthorized use of the water, although there may be no actual damage. The same law applies to the corresponding rights of air and light: Held, therefore, in the present case, that as the irrigation took place not continuously, but only at intermediate periods, when the stream was full, and no damage was done to the working of the plaintiff's mill, and the diminution of water was not perceptible to the eye, the use of the water by the defendant was

reasonable, and was not prohibited by law. *Embrey v. Owen*, 20 Law J. (N. S.) Exch. 212.

WILL.—1. *Charge of debts—Estate of executor.*—E. H. by will, after charging all his real and personal estate with the payment of his debts, funeral and testamentary expenses, and of a certain legacy, gave and devised the rents and profits of all his messuages, tenements, farms and lands, except his Bala houses, to A. H. his wife; and by the same will he gave her the whole of his personal estate, and appointed her sole executrix: Held, that the Bala houses passed to the heir at law of E. H., subject in equity to the charge of debts, and that A. H. had no power to dispose of them for the purpose of paying the debts. *Doe d. Jones v. Hughes*, 20 Law J. (N. S.) Exch. 148.

2. *Posthumous child—Implication.*—Where a testator, in contemplation of immediate death, devised his lands to his wife for life, and remainder in fee to his nephew, with a condition that if his wife should give birth to a posthumous child, such child should take to the exclusion of the nephew, and afterwards, in the testator's lifetime, a child was born: Held, that such child did not take by implication under the will. *Semble*, that *White v. Barber* cannot be supported. *Doe d. Blakeston v. Haslewood*, 20 Law J. (N. S.) C. B. 89.

WITNESS.—1. *Commission to examine—Taxation of costs.*—The omission to state time and place, both in the order for a commission to examine a witness under the 1 Will. 4, c. 22, and in the commission itself, amounts, at most, to no more than an irregularity. Where, therefore, upon such a defective proceeding being obtained solely at the instance of the plaintiff, the attorneys on both sides had agreed between themselves to a certain time and place, at which the examination under the commission took place, and the witness was then and there cross-examined on behalf of the defendant, and afterwards, at the trial of the cause, certain letters, proved under the commission, were put in evidence without objection: Held, that the defendant could not take advantage of the defect in the proceedings, so as to deprive the plaintiff of the costs of such commission, allowed him upon taxation. *Hawkins v. Baldwin*, 20 Law J. (N. S.) Q. B. 198.

2. *Competency of person in whose behalf action brought.*—A person entitled to a share in the proceeds of lands, devised to A. in trust for sale, is a competent witness in an action brought by A. to establish his right to the land. *Harding v. Hodgkinson*, 20 Law J. (N. S.) Exch. 236.

CRIMINAL AND MAGISTRATES' CASES.

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20 Law J. (N. S.) parts 5, 6, 7.

APPRENTICESHIP.—*Allowance*—3 & 4 Will. 4, c. 63—2 & 3 Vict. c. 71—*Metropolitan police magistrate.*—By the 3 & 4 Will. 4, c. 63, s. 3, indentures for binding parish apprentices within any city, &c., are to be allowed by two justices, one acting for and on behalf of the county, and the other for and on behalf of the city, &c., within the limits of which the child is bound. By the 2 & 3 Vict. c. 71, s. 14, a single police magistrate, sitting at a police court, may do any act directed to be done by more than one justice. A pauper was bound apprentice by the parish of A., which was situate within the city and liberty of Westminster, into the parish of B., in the county of Middlesex. Justices for the county of Middlesex have concurrent jurisdiction, and usually act in the liberty of Westminster: Held, that the indenture of apprenticeship was properly allowed by a single police magistrate. *Reg. v. St. George's, Bloomsbury*, 20 Law J. (N. S.) M. C. 200.

BASTARDY.—*Order of maintenance—Excess of jurisdiction.* An order of maintenance ordered a person, as putative father, to pay a weekly sum for the maintenance of a bastard child from the birth of the child. As the application for the order was not made until more than two months after the birth, the order was clearly bad as to the period between the date of the birth and the time of applying for the order. Notice of abandonment of all claim under the order for payment anterior to the date of the order had been served on the putative father: Held, that the order was valid, and might be enforced against the putative father in respect of the weekly payments which became due after the date of the application to the magistrates. *Reg. v. Green*, 20 Law J. (N. S.) M. C. 168.

CERTIORARI.—*To remove order of sessions—Affidavit of service on justices—Justices' names appearing in caption.*—The affidavit of service of notice of an intention to apply for a certiorari to remove an order of sessions under the stat. 13 Geo. 2, c. 18, s. 5, stated that the notice was served on A. B. and C. D., acting as jus-

tices of the peace for the said connty of S. at the said general quarter sessions of the peace. The order of sessions, which purported to be made on the day to which the affidavit referred, contained in the caption the names of A. B. and C. D., who were two of the justices by and before whom the order was made, and that no presumption could be drawn that they were present when the order was made from the circumstance of their names appearing in the caption. *Reg. v. St. James, Colchester (Inhabitants of)*, 20 Law J. (N. S.) M. C. 203.

COPYRIGHT OF DESIGNS.—6 & 7 Vict. c. 65—*Shape and configuration*.—A design was registered for a new ventilator, consisting of an oblong pane of glass fixed in a frame, which was inserted into an ordinary window frame, and was hinged at the top, so as to open and admit the air by means of a screw acted upon by cords passing over its head, and having a half frame of glass fixed in the lower portion of the frame in which the ventilating frame moved, so as to prevent a downward draught. The claim of the inventor was stated to be for the general configuration and combination of parts, none of which, if taken per se, and apart from the purposes thereof, were new or original: Held, that this was not a design for the shape and configuration of an article of manufacture within the 6 & 7 Vict. c. 65, and, therefore, not the subject of registration. A conviction for the infringement of such a registered design was quashed for want of jurisdiction. *Reg. v. Bessell*, 20 Law J. (N. S.) M. C. 177.

EVIDENCE.—*Cross-examining witness for prosecution*.—On the trial of an indictment the counsel for the prisoner is not at liberty, when cross-examining a witness for the prosecution, to put into the witness's hand his deposition taken before the magistrates and then ask the witness whether, having looked at the paper, he still adhered to the statement already made in his evidence in court, the counsel not intending to put the deposition in evidence. *Reg. v. Ford and others*, 20 Law J. (N. S.) M. C. 171.

LARCENY.—*Stealing from a counting house*.—The prisoner was indicted for stealing money from a counting house. The proof was, that he stole the money from a building called "the machine house," on the premises of a person who had large chemical works. All goods sent out were weighed in this building, and in it the men's time was taken and wages paid. The books in which the men's time was entered were brought to the building for the purpose of making the entries, but were kept in another building on the premises called "the office," where the general books and accounts of the concern were kept: Held, that there was evidence that the building was a counting house within the act 7 & 8 Geo. 4, c. 29, s. 15. *Reg. v. Potter*, 20 Law J. (N. S.) M. C. 170.

ORDER OF JUSTICES.—*Informality in warrant—Exceeding jurisdiction*.—11 & 12 Vict. c. 43, ss. 14, 17 & c. 44, ss. 1, 2—53 Geo. 3, c. 127, s. 7.—By section 1 of 11 & 12 Vict. c. 44, "every action to be brought against any justice of the peace for any act done

by him in the execution of his duty as such justice, with respect to any matter within his jurisdiction, shall be an action on the case." By sect. 7 of 53 Geo. 3, c. 127, two justices are empowered, "by order under their hands and seals," to direct the payment of money due for church rates, with costs; and upon refusal of parties "to pay according to such order," by warrant under hand and seal to levy the rate and costs by distress. By section 14 of 11 & 12 Vict. c. 43, it is enacted, "that if justices convict or make an order against a defendant a minute thereof shall be then made, and the conviction or order shall be afterwards drawn up in proper form, under their hands and seals." By section 17—"In all cases where, by any act, authority is given to levy any sum upon any person's goods by distress for not obeying any order of justices, the defendant shall be served with a minute of such order before any warrant of distress shall issue in that behalf. The plaintiff having been rated to a church rate and refused to pay, a complaint was made before justices and duly heard; and on the 6th of May a verbal order was made for payment by the plaintiff of the amount of the rate and costs. This order was not formally drawn up till some days afterwards. On the 7th, a minute of the order was served upon the plaintiff, who refused to pay. After such refusal the order was formally drawn up, dated the 6th of May, and a warrant issued by the defendants, dated the same day, which was not executed until October, when a cart of the plaintiff was seized for the distress. It did not appear whether the warrant was drawn up before or after the order, dated the 6th of May, nor did it recite the order. The plaintiff having brought trespass for the seizure: Held, that it was not necessary before issuing the warrant that an order should have been formally drawn up under hand and seal, but that the pronouncing of the order on the 6th, and the service of the minute of the order on the 7th, were sufficient to justify the issuing of the warrant, and that the non-recital of the order in the warrant, and the fact of the date of the warrant being the same as that of the order, and the neglect to show in the warrant that it had issued subsequently to the disobedience of the order, being all only matters of form, the defendants were entitled to the protection of section 1 of 11 & 12 Vict. c. 44. *Semble*, (per Jervis, C. J.) The words, "exceeding his jurisdiction," in sect. 2 of 11 & 12 Vict. c. 44, mean doing something which the justice could by no possibility have a legal right to do. *Ratt v. Parkinson*, 20 Law J. (N. S.) M. C. 208.

ORDER OF REMOVAL. — 1. *Removability* — 9 & 10 Vict. c. 66—*Residence*.—Where a valid order of removal has been bonâ fide executed by taking the pauper to the parish where he is settled, and there delivering him to the overseers, such a removal operates as an interruption of residence within the 9 & 10 Vict. c. 66, however short be the period during which the pauper was actually absent from the removing parish. A pauper who had resided in the parish of S. since 1835, was in 1845 removed to the parish of C. under a valid order of justices, which was unappealed against, by delivering

him to the overseer of C. at his house in that parish. After this removal, but on the same day, an agreement was entered into between the officers of the two parishes, that the pauper should return to S. and be there maintained at the cost of C. The pauper accordingly returned on the same day to S. and slept there that night, and had ever since resided there. He was relieved by C. until the passing of the 9 & 10 Vict. c. 66. In 1847, an order for his removal from S. to C. was made: Held, that he was not irremovable. *Reg. v. Caldecote*, 20 Law J. (N. S.) M. C. 187.

2. *Removability*—4 & 5 Will. 4, c. 76, s. 56—9 & 10 Vict. c. 66, s. 1.—Relief given to a parent on account of his children is relief received by the children, within the proviso of the 9 & 10 Vict. c. 66, s. 1. The paupers, who were under the age of sixteen and unemancipated, had resided in the township of M. for eight years. For the first five years they resided with their mother, who was a widow, and in receipt of relief for her own and their support; for the last three they had themselves received relief: Held, that they were removable from M. *Reg. v. Shavington-cum-Gresty*, 20 Law J. (N. S.) M. C. 194.

POOR LAW COMMISSIONERS AND POOR LAW GUARDIANS.—*Validity of orders of*—4 & 5 Will. 4, c. 76, s. 105—2 & 3 Vict. c. 84, s. 1—5 & 6 Vict. c. 57—*Action against magistrates.*—The Poor Law Commissioners, in 1837, by an order, directed nine parishes, townships and places to be formed into an union, called the Pateley Bridge Union, for the administration of the poor laws, and amongst them Bewerley and Dacre, which they treated as two distinct townships. They then directed them to contribute to a common fund for the purpose of providing a workhouse, &c., and afterwards fixed the proportions payable by each township or place, together with the number of guardians to be appointed for each. In 1848 the chairman and guardians of this union made an order to the plaintiff and three others, as overseers of the parish of Dacre-cum-Bewerley, (treating the two as one township,) for payment of 500*l.* by way of contribution towards the relief of the poor, &c. This order having been disobeyed the defendants, who were magistrates, issued their summons to the plaintiff and the other overseers, as overseers of Dacre-cum-Bewerley, and afterwards issued a warrant of distress, under which the plaintiff's goods were taken. The defendants tendered evidence that the two places had from time immemorial formed one township only. The judge rejected that evidence, and directed the jury that the order of the chairman and guardians was not valid, on the ground that the order of the Poor Law Commissioners, until removed by certiorari and quashed, was final as regarded persons acting under it: Held, first, that the 2 & 3 Vict. c. 84, s. 1, gave to the magistrates a power similar to that exercised by them in enforcing a legal poor rate. That the existence of a legal obligation to pay the contribution was a necessary preliminary condition to their having any authority to enforce payment; and that if no such obligation existed the magistrates had acted without jurisdiction and were

liable in trespass: Held, secondly, dubitante Alderson, B., that although the order of the commissioners would have been wrong in ordering three guardians to be erected for Bewerley and two for Dacre, instead of five for the entire township, if those places constituted one township, still that the order, until removed by certiorari and quashed, was valid ad interim, by virtue of the 4 & 5 Will. 4, c. 76, s. 105, and that the acts of the guardians, and the order made by them, were valid. *Newbold v. Coltman*, 20 Law J. (N. S.) M. C. 149.

POOR RATES.—*Liability to*—*Southampton Dock Company*—*Construction of 13 Geo. 3, c. 50, s. 25.*—*Expenses of steam-tug*—*Income tax.*—The Southampton Dock Company's premises consisted in part of the custom house, rented and occupied by her Majesty's Commissioners of Customs, and a manufactory and several workshops, rented and occupied by the West India Mail Packet Company, and J. W. The company, under the 188th section of the Dock Act, which empowered them to build or provide out of their income steam-tugs for towing vessels into or out of the docks from or to Southampton, or to any part of the British Channel, had actually in use a steam-tug which offered considerable advantage to those who used the docks, and was conducive to the general profits of the dock business. It was not however indispensable, as other steam-boats might have been hired at Southampton for the same purpose, but at less advantage and convenience both to the company and those using the docks. Attached to the freehold, and essential to the business of the company, was certain fixed plant, consisting of cranes, steam-engines, shears, derricks, dolphins, and other like ponderous machinery, which however were capable of being detached as easily and with as little injury to the freehold as tenant's fixtures put up for the purposes of trade and business, and usually valued as between incoming and outgoing tenants: Held, upon a case stated as to the extent of the company's liability to be rated to the relief of the poor, first, that the 25th section of the 13 Geo. 3, c. 50, "For the better Regulating the Poor, &c. of Southampton," and which provided that every person, whether the landlord or tenant, who should let out his house in separate apartments or ready furnished to lodgers should, for the purposes of the act, be deemed the occupier and liable to be rated, did not apply to the part of the company's premises of which they were not the occupiers. Secondly, that the steam-tug must be taken as ancillary to the docks, and a part of the floating capital, and that the expense of it was a proper deduction to be made in estimating the amount of the company's assessment to the rate. Thirdly, that an allowance to directors for management was another proper deduction to be made as a reasonable amount of remuneration for personal trouble and expense, and for the exercise of the skill and judgment of a supposed lessee of the company in managing the affairs of the docks, independently of the profit on capital employed by him. Fourthly, that the cranes, steam-engines, and other ponderous machinery, were properly included in estimating the rateable value of

the company's premises. Fifthly, that no deduction could be made for income tax in respect of the estimated profit of a supposed tenant of the docks, that not being a tax upon the subject-matter rated but upon the net income of the tenant after paying the rent of the premises. *Reg. v. Southampton Dock Company*, 20 Law J. (N. S.) M. C. 155.

SETTLEMENT.—*Clerk to district church*—3 W. & M. c. 11, s. 6.—A pauper had been appointed to the office of clerk of a district church in the township of A., established under 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, by the curate of such district church, and continued to act in the said office for eight years, with the knowledge of the vicar of the parish, of which the district formed a part, and without any attempt having been made to move him: Held, that by serving such office the pauper acquired a settlement in the township of A. under the stat. 3 W. & M. c. 11, s. 6. *Reg. v. Inhabitants of Township of Ossett*, 20 Law J. (N. S.) M. C. 205.

TURNPIKE ACT.—*Construction of—Indictment.*—A turnpike act, passed in 1840, and which was to be in force for thirty-one years, provided that it should not be lawful to continue or erect any turnpike gate across the roads in the town of T., or in any other town through or into which the said roads might pass or be made: Held, that the prohibition extended to the erection of a gate within the limits of the town of T. as it existed at any time during the operation of the act, and not merely at the time when the act passed. On the trial of an indictment against the turnpike trustees for erecting a gate within the town of T., the judge directed the jury that the word "town" was to be taken in its popular sense of a collection of houses, and that they were to consider whether the spot where the gate stood was so surrounded by houses that the inhabitants might fairly be said to dwell together, the fact of the houses being separated by gardens not preventing them from lying together: Held, not to be a misdirection. *Reg. v. Cottle*, 20 Law J. (N. S.) M. C. 162.

EQUITY.

Comprising the Equity Cases contained in the following Reports :—

12 Beavan's Reports, part 3.
1 Simons, part 2.

2 De Gex & Smale, part 4.
20 Law Journal (N. S.) part 5, 6, 7.

ABATEMENT.—*Defendant deceased—Revivor.*—Before decree a plaintiff has an option whether he will revive or not, and the executor of a defendant, who had died, cannot compel the plaintiff to revive. *Reeves v. Baker*, 20 Law J. (N. S.) Chanc. 278.

ACCOUNTS.—*Evidence.*—A gave a bond to B. for 4000*l.*, and died, leaving C. his executor. B. died, leaving D. his executor. Bill by C. against D. to enforce the bond. C. filed a cross bill against D., alleging that there had been various accounts between A. and B., and that the bond ought to be taken subject to the account, and not according to the letter; and, in support of such allegations, adduced as evidence an account in the handwriting of B. A decree was made in the causes for taking the accounts between A. and B., and for an inquiry as to the circumstances under which the bond was given: Held, on exceptions to the Master's report, that the account in B.'s handwriting was to be taken as evidence in favour of B. and against A., as well as in favour of A. and against B. *Dickin v. Ward*, *Ward v. Dickin*, 20 Law J. (N. S.) Chanc. 211.

ANNUITIES.—*Presumption—Act of Parliament.*—An act of parliament was passed in 1816 for the purpose of raising 5000*l.* for the repair of one of the parish churches in London. The act appointed certain persons to be trustees, and gave them the power of levying rates, and authorized them to raise the money required by the granting of life annuities, by way of simple annuity or for the lives of two persons or the survivor, with this restriction, that no annuity should be granted for any single life at a higher rate than 8*l.* 3*s.* per cent., when the life of the annuitant should be under thirty-five. In 1817, in consideration of 2500*l.* paid by A., the trustees granted an annuity of 225*l.* to A. and B. and the survivor. B. was then thirty-three years of age. Another act was passed in 1819, which recited that the trustees had raised 5000*l.*, and granted annuities to the extent of 297*l.* (which included the above-mentioned sum of 2500*l.* and the annuity of 225*l.*), and enacted that the annuities already granted should be paid in the first place out of the rates. The annuity was paid up to 1848, when the trustees resisted further pay-

ment, on the ground that the grant had been void under the act of 1816: Held, that, if the grant had been void under the act of 1816, the defect was cured by the act of 1819. The restriction contained in the act of 1816 was directory, and not prohibitory. *Semble*, almost anything will be presumed in favour of a grant made fairly, and under good advice on the part of the grantors, and acted upon for upwards of thirty years. *Delarue v. Church*, 20 Law J. (N. S.) Chanc. 183.

ASSETS.—3 & 4 Will. 4, c. 104.—The equity of redemption of a mortgage in fee is made legal assets by 3 & 4 Will. 4, c. 104. *Foster v. Handley*, 1 Sim. 200.

BANKING COPARTNERSHIP.—*Public company not incorporated.*—A banking copartnership, which made returns to the Stamp Office pursuant to 7 Geo. 4, c. 46, Held to be a public company not incorporated within the meaning of 1 & 2 Vict. c. 110, s. 14. *Macintyre v. Connell*, 1 Sim. 225.

BARON AND FEME.—*Reversionary interests.*—A married woman can do no act to affect her reversionary interest in a sum of money charged upon land, during the lifetime of the tenant for life. *Hobby v. Allen*, 20 Law J. (N. S.) Chanc. 199.

CLAIM.—1. Motion for an order under the 31st General Order of May, 1845, against a defendant to a claim who had absconded, refused. *Smith v Corles*, 1 Sim. 259.

2. *General Orders of April, 1850—Evidence—Promise, without consideration—Costs.*—Claim for payment by the defendant, on being indemnified by the plaintiffs, of amount of lost cheque given by him to alleged agent of the plaintiffs, for goods sold and delivered. The cheque was lost during transmission by alleged agent through the post to another agent of the plaintiffs. The defendant promised to give them another cheque for the amount, but afterwards refused to do so, denied the alleged agency and debt, and stated that he had given the cheque by way of loan to the alleged agent to enable him to pay a debt due from the latter to the plaintiffs. The alleged agency was not proved otherwise than by the affidavits of the plaintiffs, and the affidavit of a third person, stating that he had received a letter (not produced) from the alleged agent, informing him that the latter had, as agent of the plaintiffs, transmitted the cheque by post: Held, first, that the evidence was insufficient to prove the plaintiffs' case; secondly, that the claim was insufficient in allegations necessary to establish a case for relief in equity, on the ground that the cheque had, under the circumstances, become the property of the plaintiffs; and thirdly, that no consideration being shown for the defendant's promise to give the plaintiffs another cheque, the promise could not be enforced. The claim, having been filed by leave of the court, was dismissed without prejudice to further proceedings by the plaintiffs. Material evidence, in the power of both parties, having been withheld on both sides, the claim was dismissed without costs. The General Orders of April, 1850, were not intended to affect or alter the ordi-

nary rule of the court requiring parties to proceed in establishing their case *secundum allegata et probata*. *Johns v. Mason*, 20 Law J. (N. S.) Chanc. 305.

COMMON INJUNCTION.—*Several defendants, dissolution against all—Motion by some.*—Upon a bill filed, the common injunction was granted to restrain proceedings at law, which had been commenced by three defendants. Two of the defendants put in their answer to the bill, and obtained the order nisi to dissolve the injunction generally, which, after cause shown by the plaintiff against dissolving the injunction, was made absolute, though the third defendant had not answered. The plaintiff was then arrested upon a writ issued by the two defendants who had answered: Held, that the defendants were not guilty of contempt of court by arresting the plaintiff, but that the orders nisi and absolute ought to have been confined to the defendants who had put in their answer, and the order for dissolving the injunction was discharged: held, also, that the court could dissolve the common injunction against several defendants, some of whom had not put in their answers, but that the special circumstance must be brought to the attention of the court by the defendants who had answered, and who sought to dissolve the injunction generally. *Money v. Jorden*, 20 Law J. (N. S.) Chanc. 174.

COMPANY.—1. *Winding-up Acts—Contributories.*—A. was one of the provisional committee and also one of the managing committee of a railway company, directed to be wound up under the Joint Stock Companies Winding-up Act. By a resolution of the committee, it was resolved, that the committee of allotment should make an allotment according to a scheme, under which each of the managing committee should have 500 shares. By a minute made at a meeting of the managing committee, signed by A. as chairman, it was reported that the committee had completed the allotment of shares according to the above mentioned scheme. Nothing further, however, was done as to this allotment: Held, that A. was properly put on the list of contributories in respect of 500 shares. *In re Oxford and Worcester Extension and Chester Junction Railway Company, Ex parte Morrison*, 20 Law J. (N. S.) Chanc. 296.

2. *Same.*—In January, 1847, A. transferred some shares held by him in a joint stock banking company to B. By one of the clauses of the deed of settlement of the company, it was declared, that the holder of shares should, after a transfer, be free from all subsequent obligations in respect of them; and by another clause, it was declared, that balance sheets should be exhibited to the shareholders every half-year, and that such balance sheet should be binding on the shareholders. The balance sheet before, and that after A.'s transfer, showed profits to a large amount, and, on both occasions, dividends were declared on the shares. In 1849 the bank failed for a very large amount. No proof was given of any losses previously to January, 1847: Held, that notwithstanding the inference from the large amount of debt due in 1849, that the bank was indebted in

January, 1847, A. was properly excluded from the list of contributories. *In re North of England Joint Stock Banking Company, Ex parte Holme*, 20 Law J. (N. S.) Chanc. 300.

3. *Same.*—A., who held shares in the company mentioned in Morgan's case, 1 Hall & Twells, 324; S. C. 1 Mac. & Gor. 225; 18 Law J. Rep. (N. S.) Chanc. 265, accepted the proposal made at the extraordinary general meeting of the company mentioned in the report of that case. By one of the clauses of the deed of settlement it was declared, that a book should be kept called "The Share Register Book," in which the names of the proprietors should be entered. A., by deed assigned his shares to B., a nominee, and one of the directors of the company, and the transfer was entered in the share register book: Held, that the case was governed by Morgan's case, and A. was properly placed on the list of contributories. *In re Vale of Neath and South Wales Brewery Joint Stock Company, Ex parte Lawes*, 20 Law J. (N. S.) Chanc. 295.

4. *Winding-up Acts—Contributories—Agreement to take shares.*—A., by a letter in 1840, addressed to the directors of a joint-stock banking company, agreed to take 500 shares in the company in addition to twenty which he already held, and gave a promissory note for the amount of the calls. A. died in 1841. In February, 1842, A.'s executors inquired of the directors what was the number of shares held by A., and received for answer that A. held twenty shares. No information was ever given by the directors to the executors as to the agreement to take 500 shares, or the promissory note. In 1843 the directors cancelled the note. In 1849 the company was ordered to be wound up: Held, that A.'s executors were not liable as contributories in respect of the 500 shares agreed to be taken by A. *In re Royal Bank of Australia, Ex parte Meux*, 20 Law J. (N. S.) Chanc. 298.

5. *Same.*—A., by a letter written in 1840, addressed to the directors of a joint-stock banking company, agreed to take 100 shares in the company in addition to twenty which he already held, and at the same time gave a promissory note for the amount of the calls. Entries were made in the books of the company of the dividends on the shares, and the interest on the note, on Mr. Robinson's account. A. went abroad in 1842, and remained there until 1848, when he died. The company was ordered to be wound up: Held, that A.'s executors were properly put on the list of contributories in respect of the 100 shares which A. had agreed to take. *In re Royal Bank of Australia, Ex parte Robinson*, 20 Law J. (N. S.) Chanc. 297.

6. *Winding-up Acts—Contributories—Costs.*—In 1845 a company was projected, and was provisionally registered, but the allottees of shares not having paid any deposits, the Standing Orders could not be complied with, and the undertaking was abandoned. The solicitor had given the members a guarantee against any expenses incurred in the formation of the company; but to avoid litigation, each of the members paid a sufficient sum to liquidate all liabilities except the solicitor's bill. The brother of the solicitor then presented a petition for winding up the company under the acts: Held, that although it

had been decided that unformed companies came within the meaning of the Winding-up Acts, the court was bound to regard the inconvenience likely to arise in such cases, where each member was only liable for the debts which he had expressly authorized; and as there were no liabilities proved which would not be covered by the guarantee, this was not a case for a winding-up order. Held, also, that although the respondent had opposed the petition without being liable as a contributory, and without being served with the petition, he was entitled to his costs. Petition dismissed, with costs. *In re Narborough and Watlington Railway Company, Ex parte James*, 20 Law J. (N. S.) Chanc. 275.

7. *Winding-up Acts—Contributories—Power of master to review his decision—Executors.*—A., the holder of shares in a joint-stock company, died in 1838, having made B. and C. his executors. The company was ordered to be wound up. In March, 1849, the master placed B. on the list of contributories, as personally liable in respect of those shares; but in February, 1851, he struck out the name of B., and placed instead the names of B. and C., as executors of A.: Held, that it was competent to the master, under the Joint-Stock Companies Amendment Act, 1849, to review his decision in this respect. B. had taken the probate to the office of the company, and between 1838 and 1848 received the dividends on the shares, and had various communications with the manager of the company in respect of them. In the greater part of these communications B. called himself, and was called, executor of A., but in some of them no allusion was made to his representative character. C. had nothing to do with the shares. The company was ordered to be wound up in 1848: Held, that B. and C. were properly placed on the list of contributories as executors of A. The question whether the master has properly exercised his discretion in reviewing his decision, particularly with reference to the circumstances that may have happened between his first and second decisions, may properly be brought before the court by way of appeal. *In re North of England Joint-Stock Banking Company, Ex parte Crossfield*, 20 Law J. (N. S.) Chanc. 301.

8. *Winding-up Acts—Contributory.*—A., the holder of shares in a joint-stock company, by his will devised his real estate to B., and made C. his executrix. A. died in 1838. At this time the company was solvent, and all their debts and liabilities, then existing, were afterwards discharged, in the regular way, out of their assets. C., after A.'s death, was treated as the proprietor of the shares, and for five years received dividends on them. C.'s name was put on the list of contributories, under the Joint-Stock Companies Winding-up Acts, as the personal representative of the testator; but, it appearing that the testator's personal estate had been exhausted, B.'s name was also placed on the list as the legatee of the testator. No action could have been brought against B., and no liability could have been established at law in respect of the shares: Held, that B. was not liable, under the Joint-Stock Companies Winding-up Acts, as a contributory. *In re St. George Steam Packet Company, Ex parte Hamer*, 20 Law J. (N. S.) Chanc. 207.

COSTS, BILL OF.—Taxation.—A meeting was appointed to settle important matters on the 23rd of August, and the costs were to be paid by A. B. The bill of costs was delivered the evening before, and payment was then insisted on, though the bill was objected to. Upon evidence of overcharge, taxation was ordered after payment. Two suits attached to the V. C. E. were compromised; in one there was an order to dismiss on the payment of costs, and the other was stayed only. The costs of both were paid under pressure, and there were overcharges: Held, that the Master of the Rolls had jurisdiction to order a taxation. *In re Elmslie*, 12 Beav. 538.

COSTS IN SPECIAL CASES.—13 & 14 Vict. c. 35—Will—Devise void for uncertainty.—At the hearing of special cases, under the 13 & 14 Vict. c. 35, the court has power to give directions as to costs. The will of a testator contained the clauses following: "Let my debts be paid. Let all my goods and chattels be sold, and the fund accumulated, except so far as is needed for the comfortable settlement of the family, except 200*l.* a-year to be laid by as a marriage portion for my daughter A. A. C. My son E. C. C. is heir to the whole real estate:" Held, that the above directions were void for uncertainty, and that the testator was to be taken to have died intestate both as to his real and personal estate. *Jackson v. Craig*, 20 Law J. (N. S.) Chanc. 204.

CREDITOR'S SUIT.—Debt proved in Master's office.—A suit was instituted by A., on behalf of himself and all the other creditors of a testator, against the executor. The executor disputed the plaintiff's debt, but admitted that he had paid all the testator's debts which had come to his knowledge, and also the legacies given by the will, and that he was the residuary legatee. The plaintiff proved the debt, and after the hearing of the cause contended that the decree ought to be prefaced with a declaration that he was a creditor on the testator's estate for the amount of his debt. But the court held, that, notwithstanding the special circumstances of the case, the declaration ought not to be made, and that the plaintiff was bound to prove his debt over against in the Master's office. *Field v. Titmuss*, 1 Sim. 218.

DOMICILE.—A feme covert, domiciled with her husband in Scotland, was entitled to the produce of a real estate in England directed to be sold. Upon proof that by the law of her domicile her personal estate vested absolutely in the husband, and that she had no equity to a settlement, the estate, being unsold, was directed to be conveyed to the husband in fee. *Hitchcock v. Clendinen*, 12 Beav. 534.

EXCEPTIONS.—An omission to give notice of the filing of exceptions on the same day does not render a subsequent order of reference irregular; but the omission is matter of compensation in time, upon a proper application. On the 6th of March, the plaintiff took exceptions, but did not serve notice until the next day, and he obtained an order to refer on the 15th. A motion to discharge the order was refused. *Lowe v. Williams*, 12 Beav. 482.

HEIR.—A testator died in 1821, having devised and bequeathed his real and personal estate to trustees upon certain trusts. In 1826, a bill was filed for the execution of the trusts as to the personal estate. In 1847, a supplemental bill was filed, raising questions on the will, as to the real estate, in which the heir, who was then unknown, was interested; and in 1849, another supplemental bill was filed to bring the heir, who was then ascertained, before the court: Held, that the heir was barred, by lapse of time, from claiming the real estate adversely to the trustees; but that he was not barred from claiming part of the real estate, as being, in the events that had happened, undisposed of, and held by the trustees in trust for him. *Simmons v. Rudall*, 1 Sim. 115.

IMPROVEMENTS.—A testator devised his estates in trust, after deducting out of the rents taxes, repairs, “improvements,” &c. and “all other necessary outgoings,” to divide the surplus between A. B. and other persons for life: Held, that an expenditure for new farm buildings, &c. not stated to be with a view of improving the rents, or to secure the continuance of the old tenants, was not within the term improvements. *Walpole v. Boughton*, 12 Beav. 622.

INFANT.—*Bill by next friend.*—When a bill has been filed on behalf of infants, the court will not, unless it is perfectly satisfied that there has been some sinister motive leading to the institution of the suit, direct, on motion before the hearing, an inquiry, whether the suit is for the benefit of the infants; and if so, whether the next friend is a proper person to conduct it, or otherwise who is a proper person to be appointed in his place; notwithstanding that the object of the suit might be effected by claim or by petition under the Trustee Relief Acts. Where there was not any imputation upon the character or solvency of the next friend in an infant’s suit, but the circumstances, under which he was named as next friend, were open to some degree of suspicion, a motion for his removal was refused without costs. *Smallwood v. Rutter*, 20 Law J. (N. S.) Chanc. 332.

INJUNCTION.—1. An equitable tenant for life being in possession of the estate, he and his lessee had committed waste, and refused to permit the trustee to examine the condition of the land. The trustee having brought ejectment, the court under the circumstances refused to continue an injunction to restrain the action, even on the plaintiff undertaking to cut no more timber, and to permit the inspection. *Pugh v. Vaughan*, 12 Beav. 517.

2. A motion being made to dissolve the common injunction, it appeared that the plaintiff had not been able to procure an office copy of the answer. Time was given to him to elect whether he would show exceptions or merits as cause. *Byng v. Clarke*, 12 Beav. 536.

3. After a railway company had purchased a piece of land from A., who was mentioned in the book of reference to be the owner of it, B., a neighbouring landowner, part of whose land the company had also taken, claimed to be owner of the piece of land, and filed a bill for an injunction to restrain the company from continuing in pos-

session of it, and from committing waste on it; but the court refused the injunction. *Webster v. South-Eastern Railway Company*, 1 Sim. 272.

4. *Equitable waste—Parties.*—In cases of equitable waste in respect of ornamental timber, a court of equity confines its protection to timber proved to have been planted or left standing for ornament; and if the settlor of the property has defined a standard of beauty or ornament, the court will interfere to prevent its being impaired. Therefore where property was settled by deed to the use of trustees and successive tenants for life, with power to cut timber thereby expressed to be then standing, and not being ornamental to the mansion-house or the pleasure grounds attached thereto, or any of the views or prospects of the same, of which timber, it was thereby declared, enough should always remain to preserve the beauty of the place unimpaired, the court, on the motion of the tenants for life in remainder, granted an injunction to restrain the tenant for life in possession from cutting certain timber, which evidence showed could not be cut without impairing the beauty of the place as it stood at the date of the settlement; but ordered the plaintiffs to give security to the tenant for life in possession for any loss or damage which he might sustain, by reason of his being restrained from completing his contracts for the sale of such timber; and offered the latter a reference to the Master to inquire what timber could be cut without impairing the beauty of the place as aforesaid. Observations on the effect of acquiescence of co-plaintiff in matter complained of. Purchasers of timber, subsequently restrained from being cut, not necessary parties to the bill for injunction. *Marker v. Marker*, 20 Law J. (N. S.) Chanc. 246.

JOINT-STOCK COMPANIES WINDING-UP ACTS.—

Excess of jurisdiction.—After the master had inserted B.'s name in the list of contributories, and after the court, on appeal, had ordered it to be struck off, the master, on new evidence being brought before him, ordered the name to be replaced on the list. The court held that the master had exceeded his jurisdiction, and ordered the name to be again struck off. *Direct Birmingham, Oxford, Reading and Brighton Railway Company, Ex parte Best*, 1 Sim. 193.

LANDS CLAUSES CONSOLIDATION ACT.—Money paid into court by a railway company, for land taken under the Lands Clauses Act, from a person who was in a state of mental imbecility, and who continued in that state until his death, but was not the subject of a commission of lunacy, ordered, after his death, not to be reinvested in or considered as land, but to be paid to his executors. *In re East Lincolnshire Railway Act, Ex parte Flamank*, 1 Sim. 260.

LEGACY.—1. *Construction.*—A testator directed his trustees to pay the interest of certain property to his wife so long as she should continue his widow, and at her decease the principal sum to be equally divided, share and share alike, among his five sisters (naming them) and their respective families, if any: Held, that on the death of the

testator's widow the estate was to be divided into fifths, and as to each fifth each sister, and such children as she had living at the decease of the testator, would be entitled. *In re Parkinson's Trust*, 20 Law J. (N. S.) Chanc. 224.

LIFE INTEREST.—Bequest to the children of A. B. for life; but in case of death before marriage his share to go to the survivors. In the margin was written, "what is to become of the principal? The share of the parent to be divided amongst the children, if any. *Quære*, to be put in afterwards in a proper manner." The children of A. B. all died unmarried: Held, that the gift was for life only, and not an absolute gift cut down merely to admit their children. *Kay v. Winder*, 12 Beav. 610.

LIVERPOOL DOCK ACTS.—Money paid into court by the Liverpool Dock Trustees, in respect of leaseholds for years, taken by them under the powers of their act of parliament, ordered to be re-invested in the purchase of copyholds of inheritance. *In re Liverpool Dock Acts*, 1 Sim. 202.

MARRIED WOMAN.—A married woman, entitled to separate property, authorized a solicitor to take proceedings respecting it. The solicitor filed a bill on her behalf, in which she and her infant child sued by one next friend, but he did not consult her as to the selection of the next friend; Held, that she was not bound by the proceedings, and a motion to strike out her name was acceded to, without costs. *Gambee v. Atlee*, 2 De Gex & S. 745.

MORTGAGOR AND MORTGAGEE.—In March, 1840, A., and B., a solicitor at Carmarthen, raised 2500*l.* by sale of a sum of stock of which they were trustees, with the intention of lending it on mortgage to C., who resided at Carmarthen, but spent part of the year in London. A. enabled B. to receive 2500*l.* for the purpose of the loan, and intrusted him with the conduct of the transaction. Accordingly B. prepared the mortgage deed, and on the 29th of May, 1840, through his London agents, and by arrangement between him and C.'s solicitor, procured C. (who knew that the money was in B.'s hands) to execute it, and to sign a receipt, on the back of it, for the 2500*l.* The agents took the deed away with them, and shortly afterwards procured A. to execute it, and then sent it to B. It having been arranged between B. and C. that the mortgage money should be paid into the Carmarthen bank to C.'s credit, B., on the 31st of May, paid into the Carmarthen bank to C.'s credit. B., on the 31st of May paid 513*l.*, and on the 31st of October, 1050*l.*, accordingly, in part of the 2500*l.* In November he died insolvent: Held, that, as between A. and C., A. was to be treated as mortgagee for the whole 2500*l.* *West v. Jones*, 1 Sim. 205.

OFFICER IN THE ARMY.—*Assignment of pay.*—An officer in the army may assign, for the benefit of his creditors, the difference received by him upon going on half pay. *Price v. Lovett*, 20 Law J. (N. S.) Chanc. 270.

PARTIES.—1. *Legatees not parties to the suit.*—A married woman invested a sum of 525*l.* stock, out of monies which she had as pin money to her separate use, in the names of trustees, in confidence that the funds should be held by them in trust for such persons as she should direct or appoint. She afterwards made a will, giving the interest of the money she had in the stocks to her servant maid for life, and afterwards to the poor of certain parishes. The wife having died, administration, with the will of his deceased wife annexed, was granted to her husband. To a bill filed by the husband alone, as such administrator, against the surviving trustee of the stock, the defendant, by her answer, suggested that the legatees under the will were necessary parties; but the court, without requiring the legatees to be parties to the suit, ordered payment of the stock to the plaintiff, with costs. *Musters v. Wright*, 2 De Gex & S. 777.

2. *Owners—Cestuis que trust.*—By an ante-nuptial settlement the trustees of it were empowered to sell out the trust fund and invest the proceeds upon (among others) real securities. By a contemporaneous memorandum, indorsed on the settlement, the settlors requested the trustees to advance the trust monies to the owners of a copyhold estate, called Vauxhall Gardens, upon mortgage, as first, second or third mortgagees: Held, that the word “owners” meant owners at the date of the settlement and memorandum; and that an advance to them without security, and the subsequent acceptance of a mortgage, with a joint and several covenant from two of the three owners, after the retirement of the third, was a breach of trust: Held, also, that in a suit by cestuis que trustent, seeking to make one of the trustees liable in respect of the breach of trust, the 32nd order of May, 1841, did not dispense with the necessity of making the co-trustees parties. The bill stated, that some of the plaintiffs were children of another plaintiff, and that they and certain defendants were the only children of the marriage. The answers did not deny the statement, but merely stated that the defendants did not know whether these were all the children, and did not raise any objection for want of parties on this ground. There was no evidence of the relationship between the plaintiffs: Held, at the hearing, that a case was made for inquiry as to this, and for payment into court of the trust fund. *Fowler v. Reynal*, 2 De Gex & S. 749.

PAUPER.—*Application by tenant for life.*—A party entitled for life to the dividends of a fund paid into court under the 10 & 11 Vict. c. 96, allowed to apply for payment in formâ pauperis. *In re Money*, 20 Law J. (N. S.) Chanc. 274.

PAYMENT OUT OF COURT.—*Prospective order.*—Order made that certain sums which had been ordered to be paid into court, but had not been paid in, might, after they were paid in, be paid out to the party entitled to them. *Milne v. Gilbert*, 20 Law J. (N. S.) Chanc. 213.

PLEA.—*Irregularity, waiver of.*—A defendant having filed a plea and answer, obtained at the rolls an order nisi to dissolve the

common injunction: Held irregular; but plaintiff having afterwards appeared before the Vice-Chancellor of England, and undertaken to show cause on the merits, held, secondly, that this was a waiver of the irregularity; and, thirdly, that the waiver might be taken notice of on a motion to discharge the order of course at the Rolls. *St. John v. Phelps*, 12 Beav. 606.

PLEADING.—1. A bill against sureties only, alleged that the principal debtors were out of the jurisdiction, but did not pray process. Upon objection in the answer for want of parties: Held, that notwithstanding the 32nd Order of August, 1841, it was necessary to pray process against the principal debtors, or one of them. *Pierson v. Barclay*, 2 De Gex & S. 746.

2. *Scandal—Exceptions overruled.*—The answer of a defendant contained these passages:—"The plaintiff is desirous of annoying and harassing the defendant to extort money from him:" "The plaintiff is acting under the advice of ignorant but cunning persons, who are in expectation of extorting money from the defendant in order to be relieved from being harassed by the vexatious and illegal conduct of the plaintiff." The plaintiff took exceptions to these passages for scandal. The exceptions were overruled. *Stanton v. Holmes*, 20 Law J. (N. S.) Chanc. 203.

POWER.—1. A power to appoint amongst children is not within the 27th section of the Wills Act; and a mere general devise or bequest to a child will not operate as an execution of such a power. *Cloves v. Awdry*, 12 Beav. 604.

2. A father had a power of appointing to any of his children. Having in breach of trust obtained possession of part of the trust funds, he in 1834 appointed that part to his daughters, in exclusion of his son, under an agreement that that part should afterwards be conveyed to him in exchange for an estate of less value. In 1844 he executed a second appointment, reciting the previous dealing with the fund, and he thereby appointed the remaining portion of the trust property "and all other" the property comprised in the settlement, to his daughters: Held, that the first appointment was void; and, secondly, that the portion of the property comprised therein was not appointed by the second deed. *Askham v. Barker*, 12 Beav. 499.

PRACTICE.—1. *Administration of.*—Bill by four of the next of kin of an intestate, for the administration of his estate, on behalf of themselves and all others the next of kin. The bill alleged that the next of kin were very numerous, but no evidence of that fact was adduced. Upon an affidavit under the 13 & 14 Vict. c. 35, that the next of kin were upwards of twenty in number, the court made the usual administration decree. *Smith v. Leathart*, 20 Law J. (N. S.) Chanc. 202.

2. *Claims.*—In orders made upon claims, the affidavits of the plaintiffs and the defendants will be entered as read, with a direction to the master that the plaintiffs' affidavits are not to be considered as evidence, and that the defendants' affidavits are to be treated in all

respects as if they were their answers to bills filed against them. *Cockburn v. Green*, 20 Law J. (N. S.) Chanc. 216.

3. *Motion to dismiss*.—The answer became sufficient on the 2nd of August, and the four weeks allowed from that time to amend the bill, extra the vacation, expired on the 18th of November. The defendant served notice of motion to dismiss at half-past seven o'clock on the evening of the 18th of November: Held, that the four weeks did not expire till twelve o'clock at night, and consequently that the notice of motion was given before the plaintiff was in default. Motion dismissed with costs. *Preston v. Collett*, 20 Law J. (N. S.) Chanc. 228.

4. *Partition*—13 & 14 Vict. c. 60—*Infants*.—Form of a decree for partition, since the 13 & 14 Vict. c. 60, where infants are parties to the suit for the partition. *Bowra v. Wright*, 20 Law J. (N. S.) Chanc. 216.

RAILWAY.—1. As to what amounts to a “wilful refusal” within the Lands Clauses Consolidation Act. *In re Windsor, Staines and South-Western Railway Act*, 12 Beav. 522.

2. A railway company took lands, the subject of an administration suit, and in which infants and married women were interested, and a reference was made to the master in the cause, to ascertain what course was the most beneficial for the parties under disabilities. The company was directed to pay all the costs, charges and expenses of the petition and reference. *Picard v. Mitchell*, 12 Beav. 486.

RAILWAY COMPANY.—*Capital—Injunction*.—The Shrewsbury and Chester Railway Company were, by various acts of parliament, empowered to make several railways, and build wharfs and warehouses for the purposes of the traffic of the company on the banks of the river Dee, the conservancy of which was vested in other persons. The railway company brought a bill into parliament to preserve and improve the navigation of the river, though it had no power to apply any of the capital of the company for the purpose. Upon a bill filed by one shareholder, Held, that the directors of the railway company could not legally apply any of the railway capital in payment of the expenses of preparing, prosecuting or promoting the bill in parliament, or for any other purpose not authorized by the acts of the railway company, and an injunction was granted to restrain them from so doing. *Munt v. The Shrewsbury and Chester Railway Company*, 20 Law J. (N. S.) Chanc. 169.

RECEIVER.—*Railway Company—Companies Clauses Consolidation Act, 1845—Jurisdiction*.—A railway company being indebted to a large amount upon bond and mortgage, and also upon simple contract, a bond creditor of the company filed a bill, on behalf of himself and other bond creditors, against the remaining bond creditors and mortgagees and the company, charging that, under the Companies Clauses Consolidation Act, 1845, ss. 42 and 44, and the special act, the bond creditors and mortgagees had a statutable lien upon all the property and effects of the company, and praying a

receiver and manager. On motion, by consent, a receiver was appointed. While the receiver was in possession, a simple contract creditor of the company sued out execution and levied upon the goods of the company, and refused to withdraw after notice of the order for a receiver. Upon a motion to commit the sheriff for contempt, it was held, that it was no answer to the motion to show that the order for a receiver ought not to have been granted; and the sheriff was ordered to withdraw and pay the costs, but without prejudice to any application by the execution creditor to be heard *pro interesse suo*, or otherwise. On petition by execution creditor, the court, on the ground that the plaintiff had no equity for a receiver, ordered that the receiver should keep sufficient goods within the bailiwick for one month, and that the execution creditor should be at liberty to levy after that time, unless in the mean time security was given for the debt, &c. to await the order of the court. The 42nd and 44th sections of the Companies Clauses Consolidation Act, 1845, do not give to the mortgagees and bond creditors of a railway company a specific lien upon the goods and chattels of the company. *Quære*, whether the Court of Chancery has jurisdiction to appoint a receiver and manager of a railway. *Russell v. East Anglian Railways Company*, 20 Law J. (N. S.) Chanc. 257.

RESTRAINT ON ANTICIPATION.—A testator, after having bequeathed a sum of stock in trust for the separate use of his wife for her life, directed that it should remain during her life, and be under the order of the trustees, made a duly administered provision for her, and the interest of it given to her, on her personal appearance, and receipt by any banker the trustees might appoint: Held, that the wife was not prohibited from alienating her interest in the stock. *Ross's Trust, Ex parte Collins*, 1 Sim. 196.

SECURITY FOR COSTS.—A plaintiff described himself as living abroad. Having given notice of a motion, the defendant appeared and asked for time to answer the affidavits, and he afterwards filed affidavits in opposition: Held, that he had not thereby waived his right to security for costs. A defendant does not by simply defending an application against him lose his right to security for costs. *Murrow v. Wilson*, 12 Beav. 497.

SOLICITOR.—Bill of costs—Taxation—A solicitor to a railway company provisionally registered, brought an action against three of the managing directors for the amount of his bill of costs, and recovered judgment. An order was afterwards obtained for winding up the company under the act, and a petition was then presented by the official manager for taxing the solicitor's bill, under the statute 6 & 7 Vict. c. 73, on the ground of excessive charges: Held, that the court could not be called upon to examine the items of a bill to ascertain their correctness, and that an allegation of excessive charges was not such a special circumstance as to bring the case within the 38th section of the act. Petition dismissed with costs. *In re*

Shrewsbury and Leicester Railway Company, Ex parte Vardy, 20 Law J. (N. S.) Chanc. 325.

SPECIFIC PERFORMANCE.—*Compensation.*—Messuages described in a particular of sale as held for the residue of a term of ninety-nine years from the 24th of June, 1838, but not as being held by an original lease, were sold subject to conditions that the purchaser should not be entitled to call for the lessor's title, and that any error or misstatement of the term of years should not vitiate the sale, but should be the subject of compensation, under a provision for arbitration, authorizing the arbitrator of either party to proceed in certain events *ex parte*. The title proved to be an underlease for a term less by three days than the term of ninety-nine years granted by the original lease. The vendor filed a bill to enforce specific performance, with compensation to an amount which had been assessed, in conformity with the conditions by one arbitrator, nominated by the vendor, the purchaser having taken no part in the arbitration. The court dismissed the bill with costs. *Madeley v Booth*, 2 De Gex & S. 718.

STATUTE OF MORTMAIN (9 Geo. 2, c. 36.)—*Shares in incorporated and unincorporated companies.*—Shares in incorporated companies having interests in land, as canal companies, railway companies, &c. constituted by acts of parliament, under which the shares are declared to be personal estate, are not within the Mortmain Act, 9 Geo. 2, c. 36. Debentures given by incorporated companies having interests in land, which merely contain a personal obligation, and do not convey the undertaking, tolls, &c. to the holder, are not within the Mortmain Act. Shares in an unincorporated banking company, which was authorized to hold lands by way of mortgage, and might have had interests in lands, and which had been constituted by deed of settlement, under which the shares were declared to be personal estate, held not to be within the Mortmain Act. Railway scrip is not within the Mortmain Act. Mortgages given by a railway company of the undertaking, and tolls, rates and sums arising by virtue of the act of parliament under which it is constituted, held to be within the Mortmain Act. Where exceptions to a master's report relate only to matters of law, and not to matters of fact, the court will not make any order on the exceptions, but express its decision by way of declaration. It was conceded by the parties interested in opposing it, that a bequest to the Commissioners for the Reduction of the National Debt, to be applied in the reduction of the national debt, was a charitable use. *Ashton v. Lord Langdale*, 20 Law J. (N. S.) Chanc. 234.

STAYING PROCEEDINGS.—A defendant offering the plaintiff all the relief specifically sought by his bill, moved to dismiss the bill without costs, or that the plaintiff might apply respecting them. The plaintiff then insisted on a further demand, which might be had under the prayer for general relief, or by amendment. The court refused the motion with costs, but intimated that this proceeding must

be considered at the hearing. The decision in *Sivell v. Abraham*, 8 Beav. 598, adhered to. *Hennet v. Luard*, 12 Beav. 479.

SUBSTITUTED SERVICE.—An appearance was entered for the defendant, and a traversing note filed. An order was made for service of it at his last place of residence. *Horlock v. Wilson*, 12 Beav. 545.

TAXATION.—1. The decision in *Robins v. Mills*, 1 Beav. 227, is inapplicable where the merits of the cause must enter into the discussion. *Webb v. Grace*, 12 Beav. 489.

2. *Overcharge.*—In taxation, abstracts are ordinarily passed if they contain eight folios on an average, but the strict rule is that they should contain ten folios. Taxation of a paid bill, sought on the ground of overcharge, in abstracts containing less than ten folios, refused, the practice being in uncertainty, and there being no pressure or surprise. Explanatory notes of the taxing master as to the charge for abstracts, &c. &c. *In re Walsh*, 12 Beav. 490.

TRUST AND TRUSTEE.—13 & 14 Vict. c. 60—*Trustee absolutely entitled under the act.*—The surviving trustee of a settlement having refused to transfer certain trust-funds to two new trustees duly appointed, it was held that the new trustees were to be considered the persons “absolutely entitled” under the act; and if the old trustee refused, upon their application, to transfer for the space of twenty-eight days, the court, upon a petition by such new trustees, would direct the secretary of the Bank of England to transfer the funds to them. *In re Russell's Trust*, 20 Law J. (N. S.) Chanc. 196.

TRUSTEE ACT.—1. 13 & 14 Vict. c. 60—*New trustees—Transfer of stock.*—New trustees of stock, appointed under the 13 & 14 Vict. c. 60, have not the right under the act to a transfer of the stock directly to them, but the right only to call for a transfer from the old trustees; or, if they should be incapable, or refuse to make such transfer, to exercise the powers of the act, which provides for such cases. *In re Smyth's Settlement*, 20 Law J. (N. S.) Chanc. 255.

2. *Vesting order—Legal estate—Mortgage in fee.*—On a petition, under the Trustee Act, 1850, of the personal representative of a mortgagee in fee, stating that the heir of the latter, after diligent search, could not be found, the court refused to make an order vesting the legal estate of the mortgaged premises in the petitioner. *In re Meyrick, Ex parte Paine*, 20 Law J. (N. S.) Chanc. 336.

VENDOR AND PURCHASER.—The case of *De Visme v. De Visme*, must be acted on with some caution, and it is not in every case of delay in the delivering of a sufficient abstract, that a vendor is to lose the interest which he has stipulated for. Upon a sale under the court, on the 14th of September, there was a condition that the purchaser should confirm the report, and, before the 10th of November, pay his purchase money and interest from the 29th of September, and be entitled to the rents from that time, and “under no circum-

stances" was he to be excused paying interest from that time. The purchaser was unable to obtain and serve the order of confirmation until the 29th of November. The abstract was delivered on the 6th of December, and the requisitions finally answered on the 17th of January: Held, that there was no such delay on the part of the vendor as to release the purchaser from payment of interest. *Rowley v. Adams*, 12 Beav. 476.

WILL.—1. *Bequest.*—A testator, by his will, gave all his personal property to his wife absolutely, but a codicil in the form of a letter, addressed to his wife, contained these words, "I hope my will is so worded that everything that is not in strict settlement you will find at your command. It is my wish that you should enjoy everything in my power to give, using your judgment as to where to dispose of it amongst your children, when you can no longer enjoy it yourself. But I should be unhappy if I thought it possible that any one not of your family should be the better for what I feel confident you will so well direct the disposal of:" Held, that the testator's widow took the property absolutely. *Williams v. Williams*, 20 Law J. (N. S.) Chanc. 280.

2. *Construction.*—A., the father of C., by his will, gave the income of his residuary estate (after the death of B., the mother of C.), to trustees, upon trust to apply it as they should think proper for the benefit of C.; and died in 1815. B., by her will, gave the income of her residuary estate to trustees, upon trust to apply a sufficient part of the income for the maintenance of C. during his life, and declared that, in case there should be a surplus of income, such surplus should be considered as principal, and invested accordingly, and gave such principal on the trusts therein mentioned, and died in 1832. C. was found a lunatic in 1818. The annual sums allowed for the maintenance of C. were less than the annual income of both the estates of A. and B.: Held, that the income of B.'s estate was to be first applied for the maintenance of C., in exoneration of the income of A.'s estate. *Methold v. Turner*, 20 Law J. (N. S.) Chanc. 201.

3. *Construction—Dying without children.*—A testator, by his will, dated in 1837, left his entire fortune to be equally divided between his two daughters, A. and B., who were his only children, with a declaration that the share of his daughter A. should devolve, in case of her dying without children, to B. and her children. At the date of the will A. was married, but had no children, and B. was married and had two children. A. died without ever having had a child: Held, that A. took an absolute interest in the personal estate bequeathed by the testator. Real estate was settled on A. in tail, with remainder to B. and her children, and A. was absolutely entitled to certain personal estate. A. being so entitled, by one settlement dated the 1st of July, 1841, and made on her marriage, assigned her personal estate to trustees, upon trust for herself for life, with remainder to C. for life, with remainder to B. and her children; and, by another settlement of the same date, also made on her marriage, conveyed the real estate to which she was entitled as tenant in tail to

trustees, upon trust for herself for life, with remainder to C. for life, with remainder to B. and her children. A. died without having barred the entail: Held, that B. and her children were put to their election between the life estate in the realty given to C. by the second deed, and the benefits in the personalty given to them by the first deed. Bill against infant defendants: the plaintiff had served defendant's solicitor with notice to produce a particular deed in his possession. The defendant's solicitor sent to the plaintiff a copy of the deed: Held, that the production of the copy at the hearing did not amount to secondary evidence of the deed against the infant defendants. A deed taken to be proved at the hearing by its production, and an affidavit of the handwriting of the parties who had executed it, on the ground of there being before the court at least evidence of an agreement to do a thing for valuable consideration. *Bacon v. Cosby*, 20 Law J. (N. S.) Chanc. 213.

4. *Construction—Dying without issue*.—A testator, by his will, gave certain shares of his residuary personal estate to certain legatees. He then directed that "the whole of the legatees should have the benefit of survivorship between them in the event of any one or more of them dying without leaving issue:" Held, that "the dying without leaving issue" did not refer to death in the lifetime of the testator. *Smith v. Stenart*, 20 Law J. (N. S.) Chanc. 205.

5. *Construction—Illegitimate children*.—A testator, by his will, gave a share of estate to his son for his life, and directed that after his death the interest should be for the maintenance of his wife and the education of his children. At his wife's death the principal to be divided among his children. For some years previously to the date of the codicil the son had been living with a woman to whom he was not married, and had by her four children. The testator was cognizant of these circumstances, and recognized the children as the children of the son and his own grandchildren, and frequently had them staying with him: Held, that the illegitimate children of the son were not included in the bequest made in favour of the children. *Warner v. Warner*, 20 Law J. (N. S.) Chanc. 273.

6. *Construction—Mortmain Act*.—A testator bequeathed the residue of his estate to trustees, to be purchased into the funds for the following purpose, viz., for opening new schools, subscribing to those already opened, in England, Scotland, Ireland and elsewhere, and purchasing land to be let out to the poor at a low rent, such rent to be applied to any benevolent purposes his trustees might think proper: Held, that the residue was divisible into two equal parts, and that one of such parts was applicable to the purposes of education, according to a scheme to be settled by the court, and that the trusts of the other part were void under the Mortmain Act. *Crafton v. Frith*, 20 Law J. (N. S.) Chanc. 198.

7. *Construction—Vesting*.—A testator by his will gave all his real and personal estate to his wife to enjoy the same "in the fullest manner, subject to the following provisions." The testator gave certain legacies. He then desired that all his property should continue

at interest, in the same situation as at the time of his death, for the benefit of his wife, and that his wife should make a will and divide the property between his and her relations, in such manner as she should think they deserved. He then declared that, if his wife should be rendered unable to make a will in the manner before suggested, this property should be sold, and that the money should be divided in the manner therein mentioned. The testator then declared that the last clause was "not to do away with, or prevent his wife from exercising, the entire right over his property, should she be enabled to carry it into effect in the way he had left it to her, or in any other most agreeable to herself." The widow of the testator by her will gave some legacies to her relations, but did not dispose of the residue of her estate: Held, that the testator's property had, under his will, vested absolutely in the widow, and went to her next of kin. *Hus-kisson v. Bridge*, 20 Law J. (N. S.) Chanc. 209.

8. *Same*.—A testator bequeathed his residuary personal estate to trustees, upon trust for A. for life, and after the death of A. the said trust-money and income, in trust for all and every the children of A., share and share alike, to the son or sons when they should have attained the age of twenty-one, and for the daughter or daughters at that age or marriage, with a gift over, if A. should die without having a child, or having any, such children should die, being sons before twenty-one, and daughters before twenty-one or marriage. A. died, leaving an only child, B., who died under twenty-one: Held, that the trust property had vested in B., so that the income between the death of A. and the death of B. belonged to B.'s estate. *Ridg-way v. Ridgway*, 20 Law J. (N. S.) Chanc. 256.

9. *Devisees—Contribution*.—A testator devised an estate, N., by his will, the limitations of which he varied by a codicil, both dated prior to the Wills Act, and afterwards he entered into a contract by which he agreed to give, after his death, to A. alone the option of purchasing the estate N., and also another estate W., upon the purchase of which the contract for an option was entered into. By a second codicil, made after the Wills Act, reciting the purchase of the estate W., he devised that estate. A. enforced a sale to him by suit against the devisees of the testator: Held, that the purchase-money of the estates N. and W. devolved according to the limitations of the will, which would have been applicable to these estates in case there had been no sale. The testator borrowed 2000*l.* to enable him to pay the purchase-money of estate W., and that sum was found by the Master to be a lien on the estate at the testator's death: Held, that the Wills Act did not alter the course of administering the assets, but that the devisee had a right to have the personal estate of the testator applied towards the discharge of the lien; and that, failing that, he had a right to have descended real estate so applied; but that, both these resources failing, the devisee was not entitled to have contribution from estates of the testator comprised either in a particular or in a residuary devise. A testator devised all his freehold estate at B., which he purchased of C., by a will dated before, and republished by

a codicil dated after, the Wills Act; but a small piece of land, purchased with the estate by the testator of C., and always held and mixed with it, was leasehold. After making the codicil, the testator purchased the fee of that small piece of land, and the leasehold interest was merged: Held, notwithstanding the 24th section of the Wills Act, that the codicil did not pass the after acquired fee. *Emuss v. Smith*, 2 De Gex & S. 722.

10. *Power of sale*.—A testator devised his real, copyhold and leasehold estates to trustees, their heirs, executors and administrators, upon certain trusts, and authorized his said trustees and the survivor of them, his heirs, executors and administrators, to sell all or any part of his property. The surviving trustee died, having by his will devised his trust estates to two persons in fee, and appointed them his executors. They entered into a contract for a sale of a part of the testator's copyright property: Held, on a special case, that the point was too doubtful to force the title on the purchaser. *Wilson v. Bennett*, 20 Law J. (N. S.) Chanc. 279.

ECCLESIASTICAL.

2 Robertson, part I.

ADMINISTRATION.—*With a copy of the will annexed, granted in conformity with the grant of the foreign court, where the testatrix was domiciled, though the correctness of that grant was questionable.*—Administration, with a copy of the will annexed, of a party domiciled in Scotland, granted in conformity with the grant of the court of competent jurisdiction in Scotland, though the judge of the Prerogative Court entertained great doubt as to the correctness of the grant in Scotland. *In the goods of Henderson*, 2 Rob. 144.

ADMINISTRATION BOND.—W. H. W. and W. H. became sureties in an administration bond, for an administrator with a will annexed, who afterwards illegally converted to his own use the goods of the testator, and left the country. On behalf of a legatee, motion was made for a decree against the representative of W. H. W. then deceased, and W. H. citing them to show cause why the bond should not be permitted to be sued for at common law, and attended with. A decree, with intimation, was issued and duly served, but no appearance was given. Leave was given for the bond to be attended with.

Subsequently the court was moved to extend that permission to a court of equity, as well as common law, and on an affidavit as to the necessity from the solicitor of the legatee, who had filed a bill in Chancery, the motion was granted. Motion for an administration, with a will annexed, during the absence from the country of the administrator, refused on the ground that the 38 Geo. 3, c. 87, applies to executors alone. *Hay v. Willoughby and Hill, in the goods of Harrison*, 2 Rob. 120.

ATTESTING WITNESSES.—1. *Capable of writing, subscribed with marks.*—A will being subscribed by two of the attesting witnesses, capable of writing, with marks: Held to be sufficiently subscribed by them. Administration, with the will annexed, was granted to the residuary legatee for life, as though the will contained sundry directions to executors, their names were specified only under the testator's signature. *In the goods of Amiss*, 2 Rob. 116.

2. *Ignorant whether a passage in a will was inserted before or after execution.*—A will having an additional bequest to a legatee inserted, by which the sense of the paragraph as that bequest stood was interrupted: Held to be entitled to probate, with such additional bequest as the attesting witnesses knew, or whether the same was or was not written previously to the execution. It is not the duty of a court of probate to raise obstacles and make the Wills' Act more difficult of compliance than it is. *In the goods of Swindin*, 2 Rob. 192.

ATTORNEY.—*Being cited at the instance of his principal to exhibit an inventory and account, appeared under protest.*—The attorney to whom administration had been granted on behalf of the relict of a deceased, being cited at the instance of the relict, residing abroad, to exhibit an inventory and account, appeared under protest, alleging that the court has not jurisdiction to require an account between a principal and agent: Held, that the attorney was bound to comply with the citation. *Bailey v. Bristowe*, 2 Rob. 145.

CONFLICT OF ATTESTING WITNESSES.—*As to the order in which the will was executed.*—On a question whether a testatrix signed her name before or after the witnesses subscribed, one of the attesting witnesses deposed throughout her examination to the impression on her mind, that the testatrix signed after them; the other, in the first instance, likewise deposed to the same effect, but after having inspected the paper she deposed that the testatrix signed before them: Held, under the circumstances of the great experience the testatrix had had in executing the wills, of her having sent to a solicitor for instructions in regard to the paper in question, and of the paper on the face of it appearing to be duly signed and attested, that the presumption is that the instrument was executed in conformity with the requisites of the statute. *Brenchley v. Still and Rackham and Lynn*, 2 Rob. 162.

EXECUTOR.—1. *Being a party to a suit, dismissed without renouncing, in order to his being examined as an attesting witness to*

the will.—An executor having taken probate of a will, dated the 24th August, 1849, was cited at the instance of legatees under a former will to bring in the probate, and show cause why the same should not be revoked. Probate was brought in, and his proctor was authorized to propound, &c. On motion the court dismissed the executor, who was a witness to the will, from the suit, in order to his being examined as a witness, without requiring him to renounce his office. *Bryan v. White and Henson*, 2 Rob. 137.

2. *Objecting to his co-executor having a grant of probate by reason of alleged incapacity.*—An executor in an act on petition, objected to a co-executor, appointed in the same will, being joined with him in the grant of probate, on the ground of incapacity. The act on petition was opposed and directed to be reformed. On the affidavits adduced in support of the pleadings of each party, the court held the incapacity was not established, and overruled the petition. *Evans v. Tyler*, 2 Rob. 128.

3. *If doubtful whether debts constitute, under particular circumstances, bona notabilia.*—When a doubt may exist whether debts, under peculiar circumstances, constitute bona notabilia, the court will decide in favour of their being bona notabilia. *Nicholl v. Thomas*, 2 Rob. 157.

INITIALS OF ATTESTING WITNESSES.—The initials of attesting witnesses to a testamentary paper are a sufficient subscription under the Wills Act; they are not required to sign their names. *In the goods of Christian*, 2 Rob. 110.

INTEREST OF NEXT OF KIN TO OPPOSE A TESTAMENTARY PAPER.—A next of kin having assigned to declare whether or not she opposed scripts A., B. and C. (a will, with two codicils), “or any or either, and which, if any,” declared she opposed C., the second codicil, on the face of which she had no interest: Held, on a suggestion, contained in her affidavit of scripts, that other intermediate papers had been executed by the testator, and were in existence, that she had interest sufficient to entitle her to oppose C., but she must declare whether she opposed A. and B. A next of kin, quâ next of kin, cannot oppose a paper without some interest, however small or remote. *Baskcomb v. Harrison*, 2 Rob. 118.

PARTY IN A SUIT NOT BOUND TO ANSWER TO ANY ARTICLE IN A LIBEL WHICH MAY TEND TO ESTABLISH THE OFFENCE CHARGED.—A party, in her personal answers to a libel, is not bound to answer to articles which, though not on the face of them criminatory, may, by possibility, furnish a link in the evidence against herself. *King v. King*, 2 Rob. 153.

PAUPER DISPAUPERED BY HIS OWN PROCTOR.—A party having been permitted so sue as a pauper, was, on facts respecting an income, proved against him by his proctor assigned to him, dispaupered. *Lait v. Bailey*, 2 Rob. 150.

RESIDUARY LEGATEE OF AN INSOLVENT ESTATE PERMITTED TO RETRACT A RENUNCIATION.—A residuary legatee, who had renounced administration de bonis non of an alleged insolvent estate, permitted to retract that renunciation and to take the administration in preference to a nominee of creditors representing a large amount of debt. *Dimes v. Cornwell, in the goods of Waters*, 2 Rob. 142.

SIGNING.—*At the foot or end.*—A will containing on the first page the appointment of an executor, a disposition of the entire property, a testimonium clause with the part of an attestation clause immediately following, but not sufficient space for the whole of that clause, the second page blank, and on the third page the remainder of the attestation clause with the signatures of the testatrix and witnesses immediately following: Held to be “signed at the foot or end,” as the attestation clause was, under the circumstance of the case, to be considered as a part of the will. An affidavit of one attesting witness to the due execution of a will is sufficient, unless more than one witness make an affidavit as to alterations in a will; in that case both or all must also join in deposing to a due execution, if an affidavit to that circumstance be required. *In the goods of Batten*, 2 Rob. 124.

2. *Same.*—A will made in virtue of a power of appointment, and having after the testimonium clause a blank space of two inches eight-tenths, and then the signature of the testatrix, held not to be “signed at the foot or end.” *In the goods of Beadon*, 2 Rob. 139.

3. *Same.*—A will, having after the testimonium clause an attestation clause extending half the width of the sheet, with the testator's signature to the right of that clause, but one inch four-tenths beneath it, and a space of two inches eight-tenths blank between the testimonium clause and his signature, held to be signed “at the foot or end.” *In the goods of Dannay*, 2 Rob. 178.

4. *Same.*—A will, having after an unfinished testimonium clause a blank of one inch eight-tenths, then on the left of that page an attestation clause extending half the width of the page, and opposite to the fourth line of the attestation clause the signature of the testator, which stood at the distance of very nearly three inches below the last line of the testimonium clause, held not to be “signed at the foot or end.” *In the goods of Hearn*, 2 Rob. 112.

5. *Same.*—A will, the dispositive part of which ended on the second page, having a blank space under the last line of one inch three-tenths, and at the end of the third page the words, “Signed by me, in the presence of the undersigned,” immediately after which followed the signature of the testator, and then an attestation clause, with the signatures of the witnesses: Held, not to be signed “at the foot or end.” *In the goods of Henry*, 2 Rob. 140.

6. *Same.*—An allegation propounding a will, occupying with the testimonium and attestation clauses two pages, save three-tenths of an inch, and having at the head of the third page a blank space of two inches two-tenths, after which stood the signature of the testator,

close to the left side of that page, and opposite to the second line of the testimonium clause, as set forth in the case, rejected on the ground that the will was not signed "at the foot or end." *Holbech v. Holbech*, 2 Rob. 126.

7. *Same.*—A will having a blank space of one inch six-tenths between the testimonium and attestation clauses, the latter extending rather more than half the width of the page, with the testator's signature opposite to the centre of it, and at a distance of two inches four-tenths from the last line of the testimonium clause: Held to be signed "at the foot or end." *In the goods of Holland*, 2 Rob. 196.

8. *Same.*—A will, commenced in 1840, with many alterations and blanks appearing, and the residue not disposed of, and having after the appointment of an executor a blank space of four inches seven-tenths, after which followed, "This my last will and testament is now signed by me, Sarah Susannah Howell, on the 10th day of July, 1844," immediately beneath which were the signatures of the testatrix and attesting witnesses, with an imperfect attestation clause: Held, that the rule in *White's* case did not apply, as the judge considered the testatrix did not intend her will to be concluded: probate refused. *In the goods of Howell*, 2 Rob. 197.

9. *Same.*—A will having a blank space of one inch three-tenths between the testimonium and attestation clauses, the latter clause extending half the width of the page, with the signature of the testator opposite to the last line but one of the attestation clause, and at a distance beneath the last line of the testimonium clause, of three inches eight-tenths: Held to be signed "at the foot or end." *In the goods of Prentice*, 2 Rob. 182.

10. *Same.*—When there is space sufficient for the signature of a testator on the same page as that on which the will concludes, and his signature is not there placed, a will is not duly signed. A will, having in the last line of the second page a blank space of four inches three-tenths, and under that line a blank space of nearly three-tenths of an inch, with the signature of the testator at a distance of two inches three-tenths from the top of the third page: Held not to be signed "at the foot or end." *In the goods of Rowe*, 2 Rob. 199.

11. *Same.*—A will having a blank space of six-tenths of an inch between the testimonium and attestation clauses, the latter extending not half the width of the page, with the testatrix's signature half an inch beneath and to the right of the attestation clause, and at a distance of two inches six-tenths below the last line of the will: Held to be signed "at the foot or end." *In the goods of Welch*, 2 Rob. 179.

12. *Same.*—Generally, if the signature of a testator be on the same page as that on which the will concludes, and placed after the conclusion, that will be a sufficient compliance with the statute. A will, having a blank space of one inch three-tenths between the testimonium and attestation clauses, the latter extending more than half the width of the page, and beneath that clause, at a distance of one inch eight-tenths, but to the right, the mark of the testatrix placed at a distance of five inches seven-tenths below the last line of the testimo-

nium clause: Held to be signed "at the foot or end." *In the goods of White*, 2 Rob. 194.

13. *Same.*—A will having after the testimonium clause, written continuously with the dispositive part of the will, a space in the last line of the testimonium clause sufficient for the signature of the testatrix, and under that line a space of nearly half an inch, and then an attestation clause followed immediately by the signature of the testatrix: Held to be signed "at the foot or end." *In the goods of Whittle*, 2 Rob. 122.

14. *Same.*—A first codicil, with the remainder of the testimonium clause terminating on the second page of the sheet, under which termination was a blank space of seven-tenths of an inch, then a full attestation clause extending half the width of that page, and opposite to the lower part of the attestation clause, at a distance of three inches and two-tenths from the termination of the testimonium clause, the testatrix signed: Held to be entitled to probate, together with the will and second codicil, respecting which there was no question. A third codicil, with the testimonium clause terminating on the second page, under which clause was a blank space of three inches three-tenths, and with the testatrix's signature at a distance of six inches seven-tenths from the top of the third page, opposite to the lower part of the attestation clause, commencing nearly half way down the third page: rejected, as not signed "at the foot or end thereof." *In the goods of Woods*, 2 Rob. 180.

SPECIFIC BEQUEST.—*Appointment of executors written below testatrix's signature, and interposed between the signatures of the attesting witnesses.*—An allegation propounding a paper containing a specific bequest, and an appointment of executors written below the testatrix's signature, and interposed between the signatures of the attesting witnesses, rejected. *Topham v. Topham*, 2 Rob. 189.

WILL.—1. *Of a feme covert.*—A feme covert having a power of appointment over a certain sum, appointed by her will that sum to trustees, upon trust to pay the interest thereof to her sons during her husband's life, and at his death to divide the principal amongst her sons who survived her, but did not name an executor. Administration, with the will annexed, was granted to the husband under the circumstances of the case, though the practice in the registry was to make such a grant to those having the interest. *In the goods of Dawson*, 2 Rob. 135.

2. *Of a seaman in the merchant service.*—A letter written by a seaman in the merchant service, in the Margate roads, unattested, containing dispositive words: Held, under sect. 11 of the Wills Act, to be his will. Justifying security is not required when a party cited has not a prior claim to a grant. *In the goods of Milligan*, 2 Rob. 108.

ADMIRALTY AND PRIVY COUNCIL.

Containing the Cases in 6 Moore's Reports, parts 1 and 2.

ADMIRALTY COURTS.—*Equitable jurisdiction of.*—Although in the decision of cases properly within the jurisdiction of the Court of Admiralty equitable consideration ought to have weight, yet that court has not jurisdiction to do all that a court of equity might do, in suits instituted by persons suing either for themselves or on behalf of themselves and others, for administration of assets or distribution of a common fund. Where therefore the owners of a vessel and part of the cargo, lost in a collision, brought an action in the Admiralty Court against the damaging vessel, and obtained a decree for the condemnation of the ship, referring the amount of damages to the registrar and merchants who were to report them; and on the same day that the decree was pronounced the owners of the remaining portion of the cargo brought an action against the damaging vessel, and applied to the court to be let in to participate rateably in the proceeds of the condemned ship remaining in the registry: it was held, first, that the Admiralty Court in such circumstances had no jurisdiction to decree a rateable distribution, and thereby take away the priority of the prior petens; and secondly, that the decree for damage and reference to the registrar and merchants was a definitive sentence. The stat. 53 Geo. 3, c. 159, was passed for the protection of owners of ships, and applies only to bills in equity and suits, or proceedings instituted by or on behalf of owners, and does not give equitable jurisdiction to the Court of Admiralty in a case where a proceeding is not taken under the statute by the owners of the ship. *Semble*, that the 15th section of statute 53 Geo. 3, c. 159, may be applicable to suits for damage in the Admiralty Court, if accompanied by a proceeding on the part of the owners for their own protection, and may lead to a distribution pro rata of the proceeds of the ship among the claimants. *Bernard v. Hyne*, 6 Moore, 56.

BILL OF SALE.—A bill of sale and assignment of goods, described as being in certain warehouses belonging to A., was given by him for the loan of a sum expressed to have been paid on the day of the date thereof. Upon an action of trover brought against the assignee of A. who had seized the goods, it appeared in evidence that

a portion only of the goods was in the warehouse specified at the date of the sale, and that no part of the loan was paid on that day, the same being discharged by instalments a few days afterwards; whereupon the judges of the supreme court held that there had been no valid transfer, and consequently no conversion, and gave an interlocutory judgment and verdict in accordance with such view: Held by the judicial committee, on appeal from such judgment and verdict, and from an order refusing a new trial, that the judgment and verdict were not justified by the evidence and must be reversed, and a new trial granted. *Seal v. O'Dowda*, 6 Moore, 324.

BOMBAY CHARTER OF JUSTICE.—By the charter of justice of the 23rd of December, 1823, establishing the supreme court at Bombay, that court was prohibited (in like manner as the supreme court at Calcutta, under the 21 Geo. 3, c. 70, s. 8), from entertaining any jurisdiction in any matter concerning the revenue, under the management of the governor and council, on any act done in the collection thereof. In an action of trespass brought against the collector of revenue at Bombay, for distraining for arrears of government “quit rent,” the defendant pleaded “not guilty” only. The supreme court at Bombay held, that the “quit rent” was not “revenue” within the meaning of the charter, and that the act complained of was not warranted by the usage of the country and of the company’s regulations, and that the court had jurisdiction to entertain the action, and found for the plaintiffs: Held, reversing such finding and judgment, first, that the “quit rent” was part of the revenue, and in the collection thereof the supreme court had no jurisdiction, and that the court being excluded by the charter from any matter concerning the revenue the plea of “not guilty” was sufficient, and that the judge ought at the trial to have directed a nonsuit, or a verdict to be entered for the defendants. A plea in abatement to the jurisdiction of the court must point out another court before which the matter is cognizable. A plea in bar, if well founded, is sufficient, without pointing out the court in which the suit ought to have been brought. If a party *bonâ fide* and not absurdly believes he is acting in pursuance of a statute, he is entitled to the special protection which the legislature intended for him, although he has done an illegal act. The supreme court, in overruling the objections to the jurisdiction of the court, refused leave to appeal; the subject matter of the action being trifling, and under the amount required by the rules of the Privy Council. Upon petition, the judicial committee granted leave to appeal, but upon terms of the East India Company paying the respondent’s costs of the appeal, to enable him to appear to prevent the question being argued *ex parte*. *Spooner v. Juddon*, 6 Moore, 257.

CONFIRMATION.—*Of letters patent under 5 & 6 Will. 4, c. 83, s. 2.*—To entitle a patentee to a confirmation of letters patent, under the statute 5 & 6 Will. 4, c. 83, s. 2, the patentee must show that he believed himself the first and original inventor. Upon an

application for a confirmation of letters patent it was proved, that the patent article was not publicly and generally known prior to the letters patent; but that some persons had systematically used an article, identical with the patent article, for several years prior to the grant of the letters patent, and that the subject of the patent was little more than an application of a well known article in trade: in such circumstances, held by the judicial committee, that it was not a case in which the statute was intended to apply, and their lordships refused to recommend the confirmation of the letters patent. *In re Card's Patent*, 6 Moore, 207.

DOMICILE.—A native born Irishman, a British subject, married a Frenchwoman domiciled in France. They resided in France till the breaking out of the French Revolution, when they emigrated to Germany. The wife died in the lifetime of her husband, without having ever come within the territory of Great Britain: Held, in such circumstances, that she did not by her marriage become a British subject; for that, while she remained abroad, she was not within the allegiance of the crown of England. An alien woman held real estates in Champagne in her own right, in fee simple, and these estates were expressly excluded by the marriage contract from the community of goods. By the custom of Paris, which governed his contract, this estate remained during the coverture the separate property of the wife; and she could, during her husband's lifetime, with his consent, have alienated them away, and have absolutely disposed of them at his death, so as to exclude her issue's right to legitim. The estates were confiscated by the French Revolutionary Government, under the law of the French convention against emigration, and she died in her husband's lifetime, leaving issue a son, a British subject: Held, that the son had neither an indefeasible or a contingent interest in such estates, and that he was not entitled to indemnify for their loss: Held, also, that the statute 7 & 8 Vict. c. 66, s. 16, by which an alien woman married to a natural born subject is naturalized, is not a declaratory act. By the common law of England, an alien woman married to an Englishman is not entitled to dower. The Matrices de Roles, or assessments to the land tax of the year 1791, the primary evidence required by the convention, No. 7, for the purpose of ascertaining the value of the confiscated estates, not being forthcoming, it was held by the Judicial Committee, that the Commissioners for Liquidating the Claims of British Subjects in France, were at liberty to adopt any other evidence which might appear to them most satisfactory in respect to the estate which was to be valued, such as the original purchase money; the valuation of the parties themselves in any subsequent transactions; where there was a lease, the rack rent; the rent, allowing a certain number of years' purchase, or the sum for which the property had been sold at the time of the confiscation. *Count de Wall's case*, 6 Moore, 217.

DUTCH ROMAN LAW.—By the Dutch Roman law, in force in British Guiana, a joint action by the holder of a promissory note will lie against the maker and indorser of such note: What held to

be a sufficient notice of dishonour to an indorser of a promissory note. *Chapman v. British Guiana Bank*, 6 Moore, 23.

EXPOSITION OF THE DOCTRINE OF MONOMANIA AND PARTIAL INSANITY.—*As applied to wills.*—If the mind is unsound on one subject, provided that unsoundness is at all times existing upon that subject, it is erroneous to suppose such a mind is really sound on other subjects; it is only sound in appearance; for if the subject of the delusion be presented to it the unsoundness would be manifested by such a person believing in the suggestions of fancy, as if they were realities; any act, therefore, done by such a person, however apparently rational that act may appear to be, is void, as it is the act of a morbid or unsound mind. Delusion is the belief of things as realities which exist only in the imagination of the patient. The frame of mind which indicates his incapacity to struggle against such an erroneous belief constitutes an unsound frame of mind. To constitute a lucid interval the party must freely and voluntarily, and without any design at the time of pretending insanity and freedom from delusion, confess his delusion. Where delusions are proved to have existed, both before and after the factum, the presumption that they existed at the time of the factum is thrown upon the party propounding the will. It is immaterial that the delusions do not appear on the face of the will. A will written in 1834, by a widow without children, a person originally eccentric, and, in after life, developing unsound delusions, conferring great benefit on a stranger, the will, not betraying on the face of it marks of insanity, in the circumstances pronounced against. *Waring v. Waring*, 6 Moore, 341.

FOREIGN BILL OF EXCHANGE.—*Payable in England.*—If a bill of exchange is drawn in one country and payable in another, and the bill is dishonoured, the drawer is liable, according to the *lex loci contractûs*, and not the law of the country where the bill was made payable. But where a bill is drawn generally, the liabilities of the drawer, accepted and indorsed, are governed by the laws of the countries in which the drawing, acceptance and indorsement respectively takes place. The principle of compensation in the civil law, adopted by the Dutch Roman law, applies to bills of exchange; and a debt due by a creditor to the debtor is extinguished by a liquid debt of the same amount due from the creditor to the debtor. A resident in Demerara drew a bill of exchange in favour of B., also resident in Demerara, payable in London, upon C., resident in Scotland, and C. accepted the same, making it payable in London. When C.'s acceptance became due, he held two bills of exchange accepted by D., which were dishonoured and protested for non-payment. D's assignees did not proceed against C., but brought an action in Demerara against A. and B., the drawer and indorser, who pleaded a right of set-off to the extent of the two bills accepted by D., which the supreme court disallowed, and found for the plaintiffs: Held by the Judicial Committee reversing such sentence—First, that the bill having been drawn in Demerara, the Dutch Roman law, in force in that colony,

must govern the case, and that by that law the bill accepted by C. was compensated or extinguished, pro tanto, by the bills accepted by D. ; Secondly, that a surety was entitled to avail himself of this rule of law in respect of a debt due to the principal debtor ; and, Thirdly, that the drawer and indorser were to be deemed sureties for the acceptor, and entitled to plead this right of set-off. *Allen v. Kemble*, 6 Moore, 315.

MADRAS CHARTER.—The supreme court at Madras (established by the Madras charter of 1800) has an equitable jurisdiction, similar to, and corresponding with, the equitable jurisdiction exercised by the Court of Chancery in England, over charities. By the 55 Geo. 3, c. 155, s. 111, the advocate-general is entitled to appear and represent the crown in informations for the administration of charitable funds. *Att.-Gen. v. Brodie*, 6 Moore, 12.

SALVAGE.—1. Upon a tender for salvage services in getting a vessel off the Newcome Sand, it appeared, that in order to get the vessel off the sand, both her bower anchors and chains were slipped, and that the salvors, after getting her off, called in the aid of another boat to recover the anchors: Held, that the general salvage was completed when the vessel was off the sand, and that the getting up of the anchors formed no ingredient in the salvage services as to entitle those who recovered the anchors to share in the general salvage of the ship and cargo. Where the salvors took no step in the Admiralty Court to issue a commission of appraisement of the vessel proceeded against, this court, as the court of final appeal, will not admit affidavits appraising the vessel. *Colley v. Watson*, 6 Moore, 334.

2. *Services by steam-tug to a sailing vessel, having a licensed pilot on board.*—A sailing vessel, having a licensed pilot on board, got on the Goodwin Sands, but was rescued by a steam-tug, which, after rendering her salvage services, was employed to tow the vessel to the Downs, but in consequence of the misconduct of the pilot, and the negligence of the master of the steam-tug, the vessel was run ashore on the Sandwich Flats: Held, in such circumstances, that the steam-tug had no claim for salvage, as the master of the steam-tug was not released from all responsibility respecting the direction of the vessel towed by reason of a licensed pilot being on board, and that it was the joint duty of the pilot and the master of the tug to do their utmost for the safety of the ship: Held also, that the master of the steam-tug could not separate the towing of the vessel from his claim for salvage services for getting her off the sands, as it was one transaction of salvage. *Shersby v. Hibbert*, 6 Moore, 90.

STATUTE.—2 & 3 Will. 4, c. 51—35th section of the rules for the vice-admiralty courts abroad.—By the 35th section of the rules respecting appeals from the vice-admiralty courts abroad, made under the authority of the statute 2 & 3 Will. 4, c. 51, all appeals are to be asserted within fifteen days after the date of the decree appealed from. In March, 1846, a decree was pronounced by the vice-admiralty court

at Saint Helena, restoring a vessel seized by a British cruiser for an alleged infraction of the Slave Trade Act, and referring the amount of costs and damages to the registrar. No appeal was asserted by the seisor's proctor, who attended before the registrar under the decree. In the month of December of that year, a petition of appeal was brought in by the queen's proctor, on behalf of the seisor, which the registrar (in consequence of the appeal not having been asserted within fifteen days) refused to receive. On an application made *ex parte*, supported by affidavits stating that it was the seisor's proctor's ignorance of the rule for asserting the appeal, which alone prevented him from appealing, leave was given to appeal, subject to a counter petition being presented by the respondent to dismiss the appeal. Upon an act on protest against the right of appeal by the respondent, Held, by the judicial committee, that there was no sufficient ground to enable them to allow the appeal. *Reg. v. Joze Alves Dias*, 6 Moore, 102.

SUIT.—*In Ceylon and England for the same subject-matter.*—The appellants brought an action of ejectment in the island of Ceylon, for lands then in the possession of the respondent, and of mesne profits. The respondent had filed a bill in the Court of Chancery in England, to establish a contract of sale of the same lands. From the insufficiency of the pleadings in the actions at Ceylon, the real question between the parties, namely, whether an absolute contract had been executed according to the law of Ceylon, was not put in issue, or before that court. This omission arose principally, if not entirely, from the conduct of the respondent. A decree was made by the district court of Kandy in favour of the appellants; but upon an application to the supreme court by the respondent, stating the omission of the facts necessary to enable the court to have decided the question at issue, and for leave to amend the pleadings, the court set aside the decree of the district court, granted a new trial, with leave to amend the pleadings and to enter into further evidence. Upon appeal from this order, the judicial committee considered that the conduct of the respondent had been such, that a new trial ought not to have been granted, and that the same point ought not to have been litigated in England and Ceylon; and, considering also the difficulty of the parties obtaining effectual relief in England, put the respondent upon terms of consenting to the dismissal of his bill in England, with costs, and to pay the costs incurred in the court below, when they would sustain the order appealed from; or, in the alternative, that their lordships would reverse the order granting the new trial, and put the appellants in possession of the lands, leaving the supreme court in Ceylon to ascertain the amount of the mesne profits. *Anstruther v. Arabin*, 6 Moore, 286.

SURETY.—M. was surety in a bond given by G., the collector of taxes in Jamaica, for payment of the collections of the year 1842. G., at the date of the bond, was in arrear for taxes collected by him in 1841. G. appointed one S., his deputy, to collect the taxes for the year, 1842, which he partly did, and G. collected the remainder.

Shortly after the collection of the taxes, the receiver-general pressed G. for the payment of the arrears of 1841. G. went to S. and obtained from him 3000*l.* to remit to the receiver-general, S. taking that amount out of a chest, in which were placed the monies collected for 1842. G. converted that sum, and also 2000*l.* which he had collected for taxes in 1842, into paper money, and transmitted 5000*l.* to the receiver-general, who appropriated the whole amount in liquidation for the arrears of 1841. In an action brought by the crown against M. upon the bond, the judge charged the jury, that if they were satisfied that the sum of 5000*l.* had been remitted out of the taxes of 1842, and that G. had not expressly assented to the appropriation of that amount towards payment of the arrears of 1841, they ought to find for the defendant: Held, by the judicial committee, sustaining a bill of exceptions to the judge's charge, and awarding a venire de novo, that the receiver-general had a right to appropriate the remittance by G. to the liquidation of the arrears of 1841, and that it was not necessary that G. should assent to that appropriation, and that M. was bound by the appropriation, and liable on the bond for the deficiency of the taxes for the year 1842. Appeal allowed, under the statute 7 & 8 Vict. c. 60, direct to her majesty in council, upon a bill of exceptions, to prevent the delay and expense of bringing a writ of error returnable before the governor and council of the island of Jamaica. *Attorney-General v. Manderson*, 6 Moore, 240.

WAGER.—By the common law of England, in force in India, an action may be maintained on a wager, although the parties had no previous interest in the subject-matter on which it is laid, if such wager be not against the interest or feelings of third persons, does not lead to indecent evidence, and is not contrary to public policy. A mere circumstance that a wager concerns the public revenue or creates a temptation to do wrong, will not render it illegal. A wager upon the average price which opium should fetch at the next government sale at Calcutta, the plaintiffs having to pay the defendants the difference between such price and a sum named, if the price should be above that sum, is not an illegal wager or contrary to public policy, though the proceeds of the opium sold at Calcutta formed part of the government revenue. The judgment of the court below, holding such wager illegal, reversed. The statute 8 & 9 Vict. c. 109, amending the laws relating to games and wagers, does not extend to India. *Thackoorseydas v. Dhondmull*, 6 Moore, 300.

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20 Law Journal (N. S.), parts 8, 9.

ACCEPTANCE OF GOODS WITHIN STATUTE OF FRAUDS.—1. W., living at Hereford, ordered goods (at a price above 10*l.*) of A., living at Bristol, and directed that they should be sent by the Hereford sloop to Hereford. They were sent accordingly; and a letter of advice was also sent to W., with an invoice, stating the credit to be three months. On their arrival at Hereford they were placed in the warehouse of the owner of the sloop, where W. saw them; and he then said to the warehouseman that he would not take them, but he made no communication to A. till the end of five months, when he repudiated the goods. In an action by A. against W. for the price :—Held, that the judge ought not to have told the jury that there was no acceptance and actual receipt under the Statute of Frauds, 29 Car. 2, c. 3, s. 17, but should have left them to find, upon these facts, whether or not there had been such acceptance and actual receipt. *Bushell v. Wheeler*, 15 Q. B. 442.

2. *Purchaser remaining at liberty to refuse them, if found inferior to sample.*—The acceptance and actual receipt of goods, which makes a written memorandum unnecessary under sect. 17 of stat. 29 Car. 2, c. 3, are not such an acceptance and receipt as will preclude the purchaser from questioning the quantity or quality of the goods, or in any way disputing the fact of the performance of the contract by the vendor. The effect of such statutory acceptance and receipt is merely to dispense with the necessity of a written memorandum of the contract. Defendant purchased wheat of plaintiff by sample, and directed that the bulk should be delivered on the next morning to a carrier named by himself, who was to convey it to the market town of W., and defendant himself took the sample away with him. On the following morning the bulk was delivered to the carrier, and the

defendant resold it at W. on that day by the same sample. The carrier conveyed the wheat, by order of defendant, who had never seen it, to the sub-vendee, who rejected it as not corresponding with the sample; and defendant, on notice of this, repudiated his contract with plaintiff on the same ground: Held, that there was evidence to warrant a jury in finding acceptance and actual receipt by defendant within the meaning of stat. 29 Car. 2, c. 3, s. 17. *Morton v. Tibbett*, 15 Q. B. 428.

APPRENTICESHIP.—*Relinquishing one of several trades by master—Alteration of deed.*—By deed of apprenticeship, A. became bound to the plaintiff, described therein as an auctioneer, appraiser and cornfactor, to learn his art, and with him after the manner of an apprentice to serve, and the defendant, the father of A., covenanted in the usual way for the performance of his duties as apprentice. The plaintiff sued the defendant on the deed, alleging as a breach that A. had absented himself from the service of the plaintiff. To this the defendant pleaded that the plaintiff had given up the trade of a cornfactor. The replication was, that the plaintiff had given it up with the consent of the defendant, and that afterwards the apprentice had continued to serve until he absented himself: Held, on demurrer, first, that the replication was bad as setting up an alteration of the deed by parol; secondly, that the carrying on all the three trades was a condition precedent to the plaintiff's right to complain of the absence of the apprentice, and that the plea therefore was an answer to the action. *Ellen v. Topp*, 20 Law J. (N. S.) Exch. 241.

ARBITRATION.—*Award—Divisibility of surplusage.*—Where an arbitrator having power, but not being bound by the terms of the submission, to direct as to a particular matter, gives a direction which is invalid, the whole award is not thereby invalid, but such invalid direction may be treated as surplusage. *Nicholls v. Jones*, 20 Law J. (N. S.) Exch. 275.

ASSESSMENT OF TAX.—The Court of Exchequer has no jurisdiction to order the Commissioners of Land Tax to cause the proportion charged upon a division to be equally assessed. *Holborn Land Tax Assessment, In re*, 5 Exch. 548.

ASSUMPSIT.—*Arbitration—Award—Finding on all the issues.*—An action of assumpsit was referred, the costs to abide the event of the award. The declaration contained two counts. There were several pleas to the first count, one of which set up that a new agreement was substituted for the agreement in the declaration. There were also pleas to the second count. The award was, that "the plaintiff had a good cause of action against the defendant, as stated in the declaration," and then assessed damages to the plaintiff: Held, that the award sufficiently decided all the issues in favour of the plaintiff. It is no objection to an award that it recites a clause in the submission which provides that documents shall be admitted in evidence without a stamp, it not appearing that the arbitrator admitted

in evidence any unstamped documents. *Phillips v. Higgins*, 20 Law J. (N. S.) Q. B. 357.

ATTORNEY.—The court will not grant an attachment against an attorney for not delivering his bill of costs, pursuant to rule of court, until after a formal demand has been made upon him for his bill by some person duly authorized to make such demand. *Baxter, In re*, 12 Q. B. Pr. 296.

BANKRUPT ACT, 12 & 13 VICT. c. 106.—*Guarantie.*—In July, 1849, A. B. brought an action against C. D., and the cause was tried on the 28th of November following, when a verdict was found for the plaintiff, with 22*l.* damages; and on the 19th of December costs were taxed for 79*l.*, and judgment was signed. On the 12th of November the defendant had obtained a protection under the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106. A private meeting was appointed for the 20th of December, and notice was given to all the creditors, including the plaintiff. On the 7th of December the defendant filed his account, proposing to pay his creditors 7*s.* 6*d.* in the pound, with a satisfactory guarantee for due payment. The plaintiff's debt was entered in the account so filed thus:—"A. B. (the plaintiff) disputed, has got judgment for 22*l.* and costs, estimated at 50*l.*" On the 20th of December the defendant swore to the truth of his account; and at a second meeting of his creditors, on the 31st of January, 1850, three-fifths of the creditors, but of whom the plaintiff was not one, assented to the compromise, subject to a guarantee to be given by S. S.; and this arrangement was subsequently confirmed by the court, and S. S. gave a guarantee, in which the consideration was stated thus:—"In consideration of your having consented, &c." The defendant was arrested on a ca. sa. after the protection had been granted and whilst it remained in force. On motion to discharge the defendant out of custody, on the ground that he was protected from arrest as to the debt and costs: Held, that he was entitled to his discharge; first, that the debt was truly specified in the account; that although the sum of 22*l.* was incorrectly described as disputed, the verdict showing it to be then due, inasmuch as the admission of the insolvent would not dispense with the proof of the debt under the statute, this description was immaterial; and that the amount was correct, as it was to be taken that the correctness of the account was sworn to at the time it was filed, which took place before the costs were ascertained; secondly, that the protection extended to the costs as well as the debt, which were merely accessory to the principal debt; and, thirdly, that assuming the guarantee so given to be void, as not disclosing any sufficient consideration, and, therefore, as incapable of being enforced, still that the protection was valid. *Southgate v. Saunders*, 5 Exch. 565.

BANKRUPTCY.—12 & 13 Vict. c. 106, s. 136—*Warrant of attorney—Judgment void against assignees.*—The 12 & 13 Vict. c. 106, s. 136, providing that every warrant of attorney which shall not be filed within twenty-one days next after the execution thereof,

in manner and form provided by 3 Geo. 4, c. 39, shall be deemed fraudulent and void, refers to the mode of filing provided by that statute, viz., that it should be together with an affidavit of the time of the execution of the warrant of attorney, but it does not incorporate the alternative in sect. 2 of that act, which renders warrants of attorney given by bankrupts valid if judgment be signed upon them within twenty-one days. Where, therefore, judgment was signed within twenty-one days upon a warrant of attorney given by a bankrupt, and on the same day a copy of it was filed with the clerk of the dockets of the Queen's Bench, but no affidavit of the time of its execution was ever filed: Held, that the judgment and execution issued upon it were void as against the assignees. *Acraman v. Herminan*, 20 L. J. (N. S.) Q. B. 355.

BILL OF SALE.—*Inventory of goods.*—A bill of sale purported to assign to G. R. "all the household goods and furniture of every kind and description whatsoever in the house No. 2, Meadow Place, more particularly mentioned and set forth in an inventory or schedule of even date, and given up to the said G. R. on the execution thereof." At the time of the execution of the bill of sale one chair was delivered to G. R. in the name of the whole of the said goods and furniture. The inventory did not specify all the goods and furniture in the house. Held, that the bill of sale only operated as an assignment of the goods and furniture specified in the inventory. *Wood v. Rowcliffe*, 20 L. J. (N. S.) Exch. 285.

CHURCH.—*Charging benefice*—13 Eliz. c. 20—*Sequestrator.*—To an action by a sequestrator of the living of S., upon a covenant to pay the yearly rent of 980*l.* contained in a lease of the rectory and tithes (with certain exceptions) of the living of S., granted by the rector of S. to the defendant before the sequestration, the defendant pleaded, seventhly, that the rector being indebted to V. and M. in large sums of money, and requiring him to pay the said debts, V. and M., at the request of the rector, consented to give him time; and V. consented to advance him a further sum, upon condition of the said lease being granted to the defendant, and of another deed being executed by which the rector appointed the defendant receiver of all the tithes, &c. demised by the said lease, and authorizing him, after deduction of a per centage, to pay therefrom the debts of V. and M., and to keep up certain policies of insurance for the benefit of V. and M., and also certain other policies, and to carry out other purposes connected with the arrangement. The plea alleged that the lease was executed as part of the same transaction, and that the rector knew at the time of the deeds being executed that the defendant was attorney and agent for V., and that the second deed was made to enable him to apply the rent reserved by the first deed in the manner above mentioned; that there was due from the rector to V. and M. more than was claimed in the action, and that he, the defendant, had applied the tithes, &c. received by him as directed by the second deed. The defendant pleaded, eighthly, that before the

execution of the lease the rector of S. was indebted to V. and M. and others, and that in consideration thereof and of a further advance by V., the rector agreed to charge the living of S. by executing the lease declared on, and by appointing the defendant agent and receiver by the deed set out in the seventh plea; and that the lease was part of the same transaction to charge the living: Held, that the seventh plea did not show any defeasance of the covenant to pay the rent contained in the lease; but also held, that there was an equitable assignment of the rent so far as necessary to pay V. and M., and that therefore the lease was void, as being part of a transaction by which the living was charged, contrary to the provisions of the 13 Eliz. c. 20, and that both the seventh and eighth pleas were good. *Waltham v. Crofts*, 20 Law J. (N. S.) Exch. 257.

COMPANY.—*Private acts of parliament*.—By an act of 12 Geo. 3, a company was incorporated by the name of the Company of Proprietors of the Chester Canal Navigation Company, for making a canal from Chester to Middlewich; by another act of the 33 Geo. 3, another company was incorporated by the name of the Company of Proprietors of the Ellesmere Canal, to make a canal from Shrewsbury to the River Mersey, at Netherpool, in Cheshire. By another act of the 44 Geo. 3 (1804), the Ellesmere Canal Company was empowered to take from the River Dee, at Llandisilio, in Denbighshire, a supply of water for their canal, and were also empowered to take water from Bala Lake, for supplying the River Dee with as much water as they should take from it for their canal, or more; and for that purpose to make cuts from the lake to communicate with the River Dee, at and with such embankments, trenches and other works as might be necessary for the purpose. In 1807 the Ellesmere Canal Company, by deed, covenanted with Sir W. W. Wynn, Bart., who was then seised in fee of Bala Lake, that they would not at any time thereafter draw off from the said lake water for the purpose of their said canal to a lower level than a mark on a certain standard to be erected near the Bala Lake, indicating the mean summer level of the waters of the said lake, nor would at any time embank or impound up the said water more than one foot above such level. In 1813 the Chester Canal Company and the Ellesmere Canal Company were by statute united into one company, by the name of the United Company of Proprietors of the Ellesmere and Chester Canals. By the 7 & 8 Geo. 4, c. cii, all the four previous acts were repealed, and the proprietors of the two companies were re-united into a new company, intituled The United Company of Proprietors of the Ellesmere and Chester Canals, for (inter alia) maintaining the former canals then already completed, and making certain new cuts; and it was thereby enacted, that all contracts, covenants and agreements entered into by virtue of the powers contained in the several repealed acts should remain in full force, as if the same had been made under the powers contained in that act; and the company were authorized to construct such or so many weirs, embankments, and other works, at or near to Bala Lake, and to do and execute all such things as

should be necessary for pounding up, &c. and drawing off the water in and from the said pool, so as to be thereby enabled at all times to replace in or restore to the River Dee an equal or greater quantity of water than should or might be taken therefrom by the said united company by means of the works at Llandisilio, for the purpose of supplying the canal therewith. By the 9 & 10 Vict. c. cccxxii, it was enacted, that the company should thenceforth be called by the name of the Shropshire Union Railways and Canal Company, and that all persons should have the same rights and remedies against the Shropshire Union Railways and Canal Company which, before the passing of that act, they had against the United Company of Proprietors of the Ellesmere and Chester Canal: Held, in an action by the devisee of Sir W. W. Wynn against the last-mentioned company for the breach of the above covenant, by impounding the water of Bala Lake to a height of more than one foot above the mark on the standard, whereby its waters overflowed and damaged the plaintiff's land, that the covenant was repealed by the 7 & 8 Geo. 4, c. cii, as to all acts bona fide done by the company, under its provisions, for the purpose of restoring to the River Dee a quantity of water equal to what they should abstract for the use of the canal by means of the works at Llandisilio. *Wynn v. Shropshire Union Railway Canal Company*, 5 Exch. 420.

COUNTY COURT ACT, 9 & 10 VICT. c. 95.—*Plea—Special demurrer.*—To a declaration in debt for goods sold, the defendant pleaded, first, that, in an action brought by the now defendant in the County Court of W. against the now plaintiff, the now plaintiff then set up a set-off as a defence, and gave notice to the now defendant that he would claim a set-off for 15*l.*; that it was adjudged that the now defendant was not indebted to the now plaintiff in the said sum of 15*l.*, or any part thereof, and that the now plaintiff had no claim against the now defendant, averring the identity of the two debts. Replication, that by the rules of the County Court, made in pursuance of the statute, any defendant desirous of setting off a debt was bound to give notice of set-off to the clerk of the court, and that the now plaintiff did not give such notice: Held, on demurrer, that the plea was bad. The defendant pleaded, secondly, that in the County Court of E., holden at W. before J. H. R., the judge of the court, and within the jurisdiction of the said court, the now defendant recovered against the now plaintiff a certain debt of 10*l.* 6*s.* 8*d.*, due to the now defendant from the now plaintiff within the jurisdiction of and recoverable in the said court, and 5*l.* 15*s.* 4*d.* for his costs, by which judgment it was ordered that the now plaintiff should immediately pay the debt and costs to the now defendant, as by the said record appeared. Verification by the record, and offer to set off the above sums: Held, on special demurrer to the plea, that it was bad, in not properly showing that the County Court had jurisdiction over the subject-matter. *Stanton v. Styles*, 5 Exch. 578.

COUNTY COURTS EXTENSION ACT, 13 & 14 VICT. c.

61, ss. 11, 12, 13.—*Costs—Judgment for plaintiff on demurrer—Verdict.*—Where a plaintiff, in an action of contract, after judgment on demurrer, recovers less than 20*l.* on an inquisition of damages, he is deprived of his costs by the 13 & 14 Vict. c. 61, s. 11, the case not coming under the exception as to judgment by default. *Quære*, whether the word “verdict” in the 12th section of the 13 & 14 Vict. c. 61, means a verdict at the trial of the cause only, or includes a verdict in a writ of inquiry, see *Reed v. Shrubsole*, 18 Law J. (N. S.) C. P. 225. *Prem v. Squire*, 20 Law J. (N. S.) C. B. 175.

COVENANT DEPENDING ON A DEVISEE OF PROPERTY BEING MADE A COVENANTOR BY A THIRD PERSON.—*Agreement not illegal.*—By agreement in writing between A. and B., reciting that A. was expecting to become seised in fee of a certain messuage, &c. on the death of E. S., widow, as the devisee under her will (which messuage, &c. were then in the occupation of lessees, under a lease of which A. was assignee), and that A. had contracted to sell all the said possibility and expectancy of an estate and interest in the said premises to B. for all A.’s estate and interest therein, expectant as aforesaid, for 2000*l.*, which B. thereby agreed to pay him, A. promised to and agreed with B. that he would, within three months from the decease of E. S., in case A. became devisee of the premises, convey the same to B., his heirs and assigns, and make him a good title; and that B. should in that event become entitled to the rents and profits from the day of E. S.’s decease; and that, in case A. should not become the devisee in fee of the premises, and should not make a good title within six months from the decease of E. S., A. should within the latter period repay the 2000*l.*, without interest, to B.; and that A. should execute a certain indenture, assigning a policy on his life as a security for such repayment; B. to re-assign, if the conveyance be perfected according to the agreement. The indenture was executed accordingly. Neither A., or any person under whom he claimed, had had possession of the premises, or the reversion or remainder thereof, or taken the rents or profits within a year before such execution. B. was not the heir of E. S., and had no interest in her life or death, unless by the above agreement: Held, on demurrer to pleas in an action of covenant on the indenture, that the agreement was not illegal, as not contravening public policy, by creating an interest in E. S.’s death, or in the exercise of an undue influence over her mind as to the making of her will; nor as a bargain, contrary to statute Hen. 8, c. 9, for a grant of pretended right or title to hereditaments of which the grantor was not in possession; nor as a wagering policy, prohibited by statute 14 Geo. 3, c. 48, or otherwise. *Cook v. Field*, 15 Q. B. 460.

DEBTOR AND CREDITOR.—*Composition—Fraud—Consideration.*—To an action for goods sold the defendants pleaded a release, to which the plaintiff replied that the release was obtained by fraud of the defendants, and issue was joined on a traverse of the replication. It appeared by the evidence that the defendant being

indebted to several persons, and, amongst others, to the plaintiff, proposed a composition of 6s. 8d. in the pound, which was agreed to by the majority of the creditors in number; but the plaintiff, who was not present when the 6s. 8d. was agreed to at a meeting of the creditors, refused to concur unless he was paid 13s. 4d. in the pound upon part of the debt, and the other part was paid in full. Upon receiving notes for the amount agreed upon, and the positive assurance of the defendants that no other creditor than himself was preferred, and that no one of them was to have anything beyond the 6s. 8d., he signed a release for his whole debt. The assurance of the defendants that no other creditor was preferred was untrue, as there was no doubt but that they had preferred other persons besides the plaintiff: Held, by Wightman, J., that it was no answer upon this issue to show that the plaintiff himself had also contracted for a preference, in fraud, not of the defendants, but of the other creditors; and that the defendants could not set up a counter fraud by them and the plaintiff, by which they colluded to deceive other persons, as an answer to a charge of fraud practised by the defendants upon the plaintiff, which would have the effect of depriving him of part of his original just right. By Coleridge, J., and Erle, J., that the replication was not proved, because the whole stipulation for a preference being a fraud on the part of the plaintiff towards other creditors, no payment of it could be legally relied on by him as forming a material inducement for this deed; and that the fact of the plaintiff having obtained a preference for himself not vitiating the release as against himself, the defendant having also given a preference to others, was no fraud upon the plaintiff. To counts upon three several promissory notes, the defendants pleaded that they were indebted to the plaintiff in 989l. 7s., and had accepted four bills of exchange for the amount, drawn by the plaintiff, and payable to his order; that the defendants compounded with their creditors, and that the plaintiff agreed to the composition, receiving a preference beyond the other creditors, and executed a release of his debt; that it was his duty to take up the four bills of exchange, but that he neglected to do so, and the owners of the bills threatened to sue the defendants, who, in order to induce the plaintiff to take them up, gave him the promissory notes in these counts mentioned; and that there was no other consideration for the giving of the notes. The plaintiff replied *de injuriâ absque tali causâ*: Held, under the above circumstances, that the plea was proved; that as the fraudulent preference of the plaintiff did not make the composition void as against him, there was no sufficient consideration for the giving the notes, as the plaintiff was bound to protect the defendants from the consequences of liability upon these bills. *Mallalieu v. Hodgson*, 20 Law J. (N. S.) Q. B. 339.

DEED, CONSTRUCTION OF.—1. *Will, construction of—Estate in fee.*—Ejectment to recover two undivided third parts of an estate called "Horsecroft." J. P. being seised in fee of Horsecroft, before his marriage with M. C. executed an indenture of settlement in 1770, whereby it was witnessed that in consideration of an intended

marriage between himself and M. C., and of the conveyance and settlement by M. C. of the estate, money, &c. thereafter mentioned, and of the benefit arising to J. P. by the marriage, and for settling a jointure and maintenance for M. C. and her children, and for settling the free estate called Horsecroft belonging to J. P., he the said J. P. granted, sold, &c. to trustees and to their heirs all that freehold estate and right of J. P. to the said estate and other the premises intended to be released by M. C. It was then further witnessed that in consideration of the marriage and of the jointure for settling the freehold estate, together with the other monies, &c., J. P. bargained, sold, &c. to the trustees, in trust for M. C. to the use of the first son of the said J. P. on the body of the said M. C. lawfully begotten, and to the heirs male of the said son lawfully begotten. J. P. had four children,—John P., who died unmarried and intestate, and three daughters. The two lessors of the plaintiff are the heirs-at-law of two of the daughters, and the female defendant is the other daughter. J. P. in 1823 made his will as follows:—"Also I give Horsecroft, my estate that I now live in, to my son John P., a lunatic." He then gave the residue of his estate to his daughter, the defendant: Held, dissentiente Platt, B., that the deed was inoperative; and by the whole court that the son John P. took under the will an estate in fee in Horsecroft. *Doe d. Pottow v. Fricker*, 20 Law J. (N. S.) Exch. 265.

2. *Validity of—Erasures and interlineations.*—The presumption of law is, that an erasure and interlineation in a deed were made at the time of the execution of such deed. Where, therefore, the question of whether or not certain erasures and interlineations in deeds had been made before execution, was left to the jury upon no other evidence than the deeds themselves: Held, no misdirection. *Doe d. Tettham v. Cattamore*, 20 Law J. (N. S.) Q. B. 364.

3. *Voluntary conveyance, 27 Eliz. c. 4—Search—Declarations of contents not admissible.*—A deed executed by S. in contemplation of marriage, without the knowledge of the future husband, by which S. gave herself an estate for life in certain leaseholds, with remainder to R. M., a son by a former marriage, and remainder over to all illegitimate sons, is not avoided by the marriage, under the 27 Eliz. c. 4, the husband not taking as a purchaser. *Quære*, whether the deed would have been bad, if it had been found as a fact that it was intended as a fraud upon the marital rights of the husband. The deed was delivered to T., with instructions not to give it up to any one but S. and R. M. together, and it was given up by T. to S. and R. M. many years after. P. and B. were the trustees named in it. At S.'s death the deed was not found on her premises, but no proper search in the repositories of the trustees was proved: Held, that the deed was intended to be inoperative, but that the search was insufficient to let in secondary evidence. Held, also, that declarations made by S. as to the contents of the deed, were not admissible as cutting down her title. Held, also, that a voluntary deed, not actually fraudulent, by which husband and wife settled the wife's chattel

interest on R. M., is not avoided, under the 27 Eliz. c. 4, by a mortgage made, the widow surviving her husband—commenting on Burrell's case, 6 Rep. 72. *Doe d. Richards v. Lewis*, 20 Law J. (N. S.) C. B. 177.

DEER.—*Evidence proper to be submitted to a jury.*—Deer in a park (though an ancient and legal park) may be so tame and reclaimed from their natural wild state, as to pass to executors as personal property. In trover, by executors against the heir, for deer in a park, it appeared in evidence that the park was originally about 900 acres in extent, but that in comparatively modern times some adjoining land had been thrown into it; that a considerable herd of deer (600 and upwards) had always been kept therein; that the deer were attended by keepers, and fed in the winter with hay, beans and other food; that the does were watched at falling time, and the fawns marked as they dropped; and that some of the deer were occasionally selected from the herd by means of dogs, and stalled and fattened for consumption, or for sale to venison dealers. There was also a considerable body of documentary evidence to show that the park had a legal origin. In his summing up, the judge told the jury, that, by the general law, deer in the park went to the heir in law of the owner of the park, but that deer which were tame and reclaimed became personal property, and went by law to the personal representative of the owner of the deer, and not to the heir of the owner of the park; and he left it to them to say whether the park in question was proved by the evidence to have been an ancient park, and the boundaries could not be ascertained; though the franchise might thereby become forfeited in reference to the crown, that would not affect the question between the parties relative to the deer, that question being, whether the deer were tame and reclaimed, which must be determined by the nature and state of the animals, and of the place in which they were kept, and their mode of treatment; and he then left them, in writing, the following questions,—1. Whether they found for the plaintiffs or for the defendant; 2. Whether they found the place to be an ancient park, with the incidents of a legal park; 3. Whether the boundaries could be ascertained by distinct marks. The jury, in answer to the second question so put, said they found the place to be an ancient park, with all the incidents of a legal park; and in answer to the third question, that the boundaries of the ancient park could not be ascertained. As to the first question, they expressed a desire to abstain from answering it; but upon being required to say whether they found for plaintiffs or defendant, they found for the plaintiffs, observing, "that the animals had been originally wild, but had been reclaimed." Held, that the direction was correct, and the verdict sufficient in point of law; and that the evidence was such as was proper to be submitted to a jury. *Morgan v. Abergavenny, Earl of*, 8 C. B. 169.

EJECTMENT.—*Canal Company—Statute, construction of.*—Ejectment to recover a portion of the land and banks of the Swansea

canal. In 1779 P., being seised of the above-mentioned land, demised the same to M. & Co. for sixty-five years. In 1793 the Swansea Canal Company was formed for making a canal, which was intended to pass, amongst other places, in part through the land in question, and they obtained an act for that purpose. In 1797 M. & Co. and the Duke of B. widened a canal made by M. & Co., and extended the same through part of the above land, which canal joined and formed a continuation of the Swansea Canal. The powers for making a portion of the canal which passes through a portion of the land sought to be recovered were obtained by the Duke of B. and M. & Co. By that act it was enacted, sect. 47, that upon payment of a certain sum of money, adjudged by certain commissioners or assessed by juries, for the purchase of any such lands, &c., it should be lawful for the canal company to enter upon such lands, or before such payment or tender by leave of the owners and occupiers, and thereupon such lands shall be vested in such company. The lands sought to be recovered in this action formed part of the lands authorized to be taken by the canal act. No payment or satisfaction was made or agreed to be made to the owners of the lands, but every thing was done by the Duke of B., with the full consent and approbation and in accordance with the wishes of such owners and proprietors. The defendant in 1835 became the assignee of the said Duke of B. One I. C., in 1800, became the purchaser of the said lands, and the interest therein afterwards became vested in the lessors of the plaintiff at the expiration of the lease in 1845: Held, that the lessors of the plaintiff were entitled to recover possession of the lands. *Doe d. Patrick v. Beaufort (Duke of)*, 20 Law J. (N. S.) Exch. 251.

ESTOPPEL BY DEED.—*Trover*.—In trover for paper it appeared, that the plaintiff and defendant had been in partnership together as paper manufacturers and iron merchants. The partnership was dissolved by a deed, which recited, that it had been agreed that the business of a paper manufacturer should belong exclusively to the defendant, and the business of an iron merchant to the plaintiff, but that the plaintiff should receive out of the stock paper to the value of 898*l.* 4*s.* 11*d.*, which should remain in the paper mill for a year, at his option. The deed also recited, that in performance of that arrangement, paper to the value of 898*l.* 4*s.* 11*d.* had been delivered to the plaintiff, and the same was then in the mill, as the plaintiff acknowledged. It was then witnessed, that in performance of the arrangement the plaintiff and defendant dissolved partnership, and the plaintiff assigned to the defendant the stock in trade of the business of a paper manufacturer, except the 898*l.* 4*s.* 11*d.* worth of paper, so delivered to the plaintiff as aforesaid, and the defendant assigned to the plaintiff the stock in trade of the business of iron merchants; there were also mutual releases. No paper whatever was set apart or delivered to the plaintiff, but the jury found that the defendant had converted the whole stock: Held, first, that the parties were estopped by the deed, to say that no such delivery had taken

place; secondly, that as the defendant had converted the whole, the plaintiff might maintain trover for his share of the stock, although no specific portion had been set apart for him. *Wiles v. Woodward*, 5 Exch. 557.

EXCEPTIONS (BILL OF).—*New trial.*—If the judge at nisi prius die before sealing a bill of exceptions to his ruling, it is not competent for any other to seal it, nor for the executors of the deceased judge to affix their testator's seal to it. In such a case the court can only grant a new trial. *Nind v. Arthur*, 7 Q. B. Pr. 252.

FOREIGN BILLS OF EXCHANGE.—*Cancelled acceptance.*—A. S., a merchant, residing at Trieste, in November, 1841, drew upon Messrs. D. & Co., the defendants, merchants residing in Liverpool, a number of bills in two parts, and requested them to accept and send them to Messrs. Glyn & Co., the London bankers of the defendants, to be held by them at the disposition of the holders of the seconds. The seconds were negotiated at Trieste and other places, and were addressed at the foot to Messrs. D. & Co. (the defendants), payable in London, the firsts with Messrs. Glyn & Co. Messrs. D. & Co. wrote across the bills a memorandum of acceptance, and transmitted them to Messrs. Glyn & Co. to be held at the disposition of the holders of the seconds, and by letters dated the 3rd of December and the 8th of December informed A. S. of what they had done. At the time the firsts were so remitted to Messrs. D. & Co., A. S. had sent the seconds to Messrs. F. & Co., of Paris, for discount, but they declined to discount them, and they were received back by A. S. on the 8th and 13th of December, and then cancelled by him. On the 4th of December A. S. wrote to Messrs. Glyn & Co. requesting them to hand to Messrs. D. & Co. all the firsts so drawn by him upon them and handed to Messrs. Glyn & Co. as before mentioned. He also wrote to Messrs. D. & Co. to request them to instruct Messrs. Glyn & Co. to return all the said firsts which remained on their hands. On the 7th of December A. S. wrote to Messrs. D. & Co. that he had annulled the previous instructions to Messrs. Glyn & Co., and he requested Messrs. D. & Co. to replace the firsts in the hands of Messrs. Glyn & Co., to be held as before. Messrs. Glyn & Co., on the 15th of December, remitted the bills to Messrs. D. & Co., pursuant to the letter of the 4th; and Messrs. D. & Co. on the 16th cancelled the acceptances. On the 18th of December Messrs. D. & Co., after the receipt of the letter of the 7th of December, wrote as follows:—"As we stated on the 16th, the first of your drafts, which Glyn & Co. returned to us, were immediately cancelled, and it would hardly do, therefore, to re-issue them in their present state; but we have to-day written to Glyn & Co. explaining this, and requesting them to refer the holders of the seconds to us when they are presented to them." On the 21st, 22nd and 23rd of December A. S. issued what purported to be seconds to intermediate indorsees, from whom the plaintiff afterwards received them for value in due course of business, the said intermediate in-

dorsees having no knowledge of the correspondence except that A. S. represented to them that the firsts had been accepted: Held, in an action by the holders against Messrs. D. & Co., that the acceptances were cancelled by the letter of the 4th of December being acted upon according to the intention of the drawer, and that the subsequent indorsements of the new seconds to the plaintiff conferred no right against Messrs. D. & Co. . *Quære*, whether the letter of the 18th of December amounted to a fresh acceptance; but held, that if it did, the defendants having pleaded the facts as above stated, such fresh acceptance should have been new assigned. *Ralli v. Dennistoun*, 20 L. J. (N. S.) Exch. 278.

INSOLVENT.—1 & 2 Vict. c. 110, ss. 76 and 78—*Order—Habeas corpus.*—A prisoner was discharged by an order of the Insolvent Court, under 1 & 2 Vict. c. 110, s. 76, except as to four debts, under s. 78, after sixteen months: Held, whether the order was invalid or not as to the latter part, on the ground of the commissioner having exercised his power in the former part, that the prisoner was not entitled to his discharge at the end of six months. *Violet, Ex parte*, 20 Law J. (N. S.) C. B. 171.

INSURANCE.—*Perils of the sea—Damage, direct and consequential.*—A ship, loaded with hides and tobacco, whilst on her voyage encountered bad weather and shipped much sea water, whereby the hides were wetted and rendered putrid. Neither the tobacco, nor the packages containing it, were immediately in contact with nor directly damaged by sea water, but the tobacco was damaged and deteriorated in flavour by the foetid odour proceeding from the putrid hides: Held, that this was a loss by perils of the sea. *Montoga v. London Assurance Company*, 20 Law J. (N. S.) Exch. 254.

JUDGE'S ORDER.—*Attorney not liable to attachment.*—A defendant obtained a judge's order in the following terms:—"It is ordered that the plaintiff do forthwith give security for costs to the satisfaction of the Master, no stay of proceedings in the meantime, the attorney for the plaintiff hereby undertaking to find such security:" Held, that the proper construction of the order was that the attorney should give the security in case further proceedings were taken, and therefore that he was not liable to an attachment for not giving the security, no further proceedings having been taken. *Hill v. Fletcher*, 5 Exch. 470.

LANDLORD AND TENANT.—*Distress for rent—Lease by joint tenants.*—A., being a tenant from year to year to six joint tenants of part of a cotton-mill and factory, four of the six executed an assignment of the whole of the factory to F., subject to the interests of A., who afterwards became the tenant of F. When the assignment to F. was executed, there were 111l. arrears of rent due from A.: Held, that after the assignment to F., all right to distrain for such arrears of rent was gone. *Staveley v. Alcock*, 20 Law J. (N. S.) Q. B. 320.

LIMITATIONS, STATUTE OF.—*Commencement of action—Indorsement.*—Upon a replication to a plea of the Statute of Limitations, stating that the cause of action did accrue within six years next before the commencement of the suit, in order to prove that issue for the plaintiff, where the writ actually served has been issued subsequently to the expiration of six years, it must be shown that the writ served had upon it, at the time of service, the indorsement required by the 2 Will. 4, c. 39, s. 10, confirming *Medlicott v. Hunter*. The above requirement is not satisfied by the mere production of the writ at the trial containing the proper indorsement. Nor is the roll containing an entry of the several writs, and stating, with reference to the writ served, that "such writ contains the indorsement," evidence that it contained the indorsement when it was served; *Walker v. Collick* explained. *Quære*, whether in the same case the indorsements on the several writs are required by section 10 of the 2 Will. 4, c. 39, to be made by the party or his attorney, and whether they must be proved to have been so made in order to save the Statute of Limitations. An abstract of title stating the recitals in certain deeds, and relied upon by the defendant when before a Master in chancery in a suit in which he was plaintiff, is admissible against him in an action, as evidence of the matters recited, without producing the deeds. *Pritchard v. Bagshawe*, 20 Law J. (N. S.) C. B. 161.

MONEY HAD AND RECEIVED.—1. *Duress of goods—Non-voluntary payment.*—Deeds of the plaintiff were placed by A. in the hands of the defendant, her attorney, and, upon application, A. declined to give any information about them, unless upon payment of a sum of money which she claimed to be due to her from the person who had devised to the plaintiff's wife the property to which the deeds related, and ultimately referred the plaintiff to the defendant. He also refused to give them up, and the plaintiff, in order to obtain them, paid the amount claimed, saying at the same time to the defendant, "You shall hear of this again:" Held, that this was not a voluntary payment, and that the amount so paid was recoverable in an action for money had and received. *Oates v. Hudson*, 20 Law J. (N. S.) Exch. 284.

2. *Waiver of trespass.*—A. and B. (the defendants) went together to the house of the plaintiff's mother, and A. seized there a sum of money belonging to the plaintiff. There was some evidence of A. and B. having gone with the intent to get the money, but there was no evidence that B. went into the house. They subsequently paid the money into a bank to their joint account: Held, that the plaintiff might waive the trespass, and maintain an action for money had and received against the two defendants. *Neat v. Harding*, 20 Law J. (N. S.) Exch. 250.

MUNICIPAL CORPORATION.—*Town councillor—Voting paper—Wrong description of place of abode*—5 & 6 Will. 4, c. 76,

s. 142.—At the election of a town councillor, a candidate, whose place of residence was “Newmarket Road,” was described in the voting papers as of “Gonville Place.” “Gonville Place” was situated in a different ward from “Newmarket Road,” but had until a few days previous to the election been the residence of the candidate: Held, that was not an inaccurate description of a place stated in a voting paper which was cured by sect. 1 & 2 of the 5 & 6 Will. 4, c. 76, which applies only to the inaccurate description of a right place, not to the accurate description of a wrong place. *Reg. v. Coward*, 20 Law J. (N. S.) Q. B. 359.

PARTNERSHIP ACCOUNT.—*Balance not recoverable.*—B., a partner in the firm of B., M. & Co., opened an account with certain bankers in the partnership name. B. was one of the commissioners under an act of parliament for paving, &c. a township, who also had an account at the same bank, and were considerably in advance. The commissioners being desirous of a further advance, the manager of the bank wrote to B. offering to make it, on condition that he would not withdraw an equal amount of his account. B. wrote in reply that he wished to have 5000*l.* advanced on those terms, adding, “I undertake not to remove my funds to the extent of this extra advance, until the same is repaid by the commissioners.” The bank made the advance, and subsequently there was a balance on B.’s account of 4876*l.*, the extra advance not having been paid: Held, that, assuming that this was a partnership account, B., M. & Co. could not recover the balance as money received for their use; and that this defence was available under the general issue. *Brownrigg v. Rae*, 5 Exch. 489.

PLEA NON ISSUABLE.—*Practice—Bill of exchange.*—The terms of a bill of exchange cannot be altered by a parol contract. A plea to the further maintenance of an action, brought by the indorsee against the acceptor of a bill of exchange, stating that the defendant was indebted to T., the drawer; that it was agreed between them that the defendant should pay by four instalments, and that the defendant should accept a bill; that the defendant accepted the bill in the declaration mentioned as security for the payment of the debt; that T. indorsed to the plaintiff, to hold the bill as his agent; that the defendant paid three of the instalments before action, and the fourth after action, on the day when it became due; and that it became the duty of T. to return the bill to the plaintiff: Held, a bad and non issuable plea. *Besant v. Cross*, 20 Law J. (N. S.) C. B. 173.

PLEA OF NON CONCESSIT.—*Infringement of patent—Specification.*—In case for the infringement of a patent, the declaration alleged that the plaintiff was the inventor of certain improvements in machinery for covering fibres applicable in the manufacture of braid and other fabric; that the queen had granted him a patent for his invention, and that the defendant infringed it. The defendant

pleaded, first, non concessit; thirdly, after setting out the specification (which recited that the queen had granted the plaintiff a patent for improvements in machinery for covering fibres, applicable to the manufacture of braid and other fabrics, communicated to him by a foreigner residing abroad), that, before the granting of the patent, the plaintiff represented to her majesty that, in consequence of a communication made to him by a certain foreigner residing abroad, he, the plaintiff, was in possession of an invention of improvements in machinery for covering fibres, applicable in the manufacture of braid and other fabrics; that her majesty, believing and confiding in the truth, and acting upon the suggestion so made by the plaintiff as aforesaid, and in consideration thereof, granted the letters-patent in the declaration mentioned; and that such representation was false, whereby the letters-patent were null and void; fifthly, that the alleged invention was not new; eighthly, that plaintiff did not by his specification particularly describe the nature of his invention, and in what manner the same was to be performed; ninthly, that no sufficient specification was inrolled. At the trial the plaintiff put in the letters-patent and specification, and gave evidence to show that a machine like his had never been in use before the date of the letters-patent: Held, that this entitled the plaintiff to a verdict upon the issue joined on the first plea; and *semble*, that the plea of non concessit did not impose upon the plaintiff the burthen of showing that the crown had power to grant, until evidence had been given on the other side to impeach the patent; and that the averment in the declaration, that the plaintiff was the inventor of the improvements for which the patent was granted, not having been traversed, the defendant was not at liberty to controvert that fact at the trial: Held, also, that the plaintiff was entitled to a verdict on the issue joined on the third plea, without any proof that the invention was communicated to him by a foreigner residing abroad, as alleged in the petition recited in the specification,—a party availing himself of information from abroad being an inventor within the meaning of the 21 Jac. 1, c. 3, s. 6. The specification stated the invention to relate to “certain improvements on, or additions to, the apparatus or parts constituting what are called braiding or plaiting-machines, whereby the inventor was enabled to produce by such machines elastic and non-elastic braids, and other fabrics, with elastic or non-elastic strands, yarns or threads, introduced lengthwise of the fabric, and four or more in the same surface or plane, or mixtures of elastic and non-elastic fibres in combination in the same fabric, such introduced elastic and non-elastic threads or strands proceeding lengthwise of the fabric produced, and not partaking of the movements of the braiding or plaiting threads or yarns, which, in the progress of working, twist round or over the longitudinal introduced threads, and plait or braid amongst each other;” and after describing the ordinary braiding machine, in which all the threads partake of like movements, and all aid in forming a fabric of plaited threads, the specification (referring to the annexed

drawings) proceeded thus to describe the new process:—"The table moves on a hollow spindle, which is fixed in the framing of the machine by screw and nut at *b*; through the tube *b*, the strand or thread of India-rubber, or of cotton, or of other fibrous material, which is to form one of the longitudinal elastic or non-elastic threads of the fabric, passes; the upper part of the tube *b* rising to such a position amongst the braiding threads, that, in the evolution of those threads from one selvage to the other of the fabric, they pass under and over (and lie at the back and front of the fabric) each of the longitudinal threads or yarns; hence the braiding will tie the longitudinal threads into a fabric, the longitudinal threads forming the length of the fabric, and the braiding threads forming the covering (when sufficiently closely worked) and the tie-threads of the fabric." The jury found that the plaintiff's machine was new, but that the use of a hollow revolving spindle or tube was not new: Held, that, inasmuch as the plaintiff's claim was not for the hollow spindle, not generally, but fixed, this finding did not negative the novelty of the plaintiff's invention; and therefore that he was entitled to a verdict on the issues joined on the fifth, eighth and ninth pleas. *Nichols v. Ross*, 8 C. B. 679.

PLEADING.—1. *Arbitration—Award—Balance—Count for interest.*—The declaration stated that a difference existed between the plaintiff and the defendant concerning certain shares bought by the plaintiff for the defendant at his request, and for which the plaintiff had paid 122*l.*; that they submitted themselves to the award of W. W. and R. P. concerning the said difference; that the defendant promised to fulfil the award; that W. W. and R. P. made their award concerning the said difference, and decided in favour of the plaintiff, and found that 50*l.*, which had been deposited by the defendant with the plaintiff, was in part payment of the shares; and, "by their award," they "requested" the defendant to pay the balance of the account: Held, that it sufficiently appeared that the arbitrators had authority to make the award, and to award a specific sum of money, although the nature of the difference was not stated: Held, also, that the "request" made by the award was equivalent to a direction to pay. *Quære*, whether the allegation, that they awarded that the defendant should pay the "balance," would have been good, if it had been pointed out, on special demurrer, that no specific sum was awarded. A count for interest upon and for the forbearance of sums laid out for the defendant, and at his request, and forborne at the defendant's request, is good, though it does not state that the money was paid to the defendant's use, or forborne to the defendant. *Smith v. Hartley*, 20 Law J. (N. S.) C. B. 169.

2. *Demurrer—Right of way.*—To a declaration in trespass *quare clausum fregit*, the defendant pleaded that he was occupier of a close called Backside Mead, with certain lands thereunto adjoining, and of another close called Mead, and divers, to wit, two other closes next adjoining thereunto, and justified under a right of way from the said Backside Mead over the locus in quo, and then into the said Mead for the better use, occupation and enjoyment of the said Backside

Mead, the said lands adjoining thereto, and the said Mead and the said adjoining closes respectively: Held, on special demurrer, that the plea stated with sufficient certainty the closes in respect of which the said right of way was claimed. *Holt v. Daw*, 20 Law J. (N. S.) Q. B. 366.

3. *Landlord and tenant—Distress for more rent than due.*—Distraint for a greater amount of rent than is due is not per se actionable. An allegation in a declaration by a tenant against his landlord, that the defendant wrongfully seized and took divers goods and chattels of the plaintiff as a distress for certain arrears of rent then pretended by the defendant to be due and in arrear to the defendant, and that the defendant afterwards wrongfully sold the said goods and chattels as such distress for the said alleged arrears of rent and the costs of such distress, will not, even to support the declaration, and after pleading over, be held to mean that the defendant sold the goods for a sum equal to the alleged arrears and costs, but only that he sold them for the purpose of satisfying such arrears and costs. *Tancred v. Leyland*, 20 Law J. (N. S.) Q. B. 316.

4. *Libel—Crime—Aggravation—Justification of whole—Estoppel—Acquittal.*—In an action for a libel, imputing to the plaintiff the commission of a crime under aggravated circumstances, it is necessary to justify the aggravating portion as well as the substantial charge of crime. So where the declaration set out a libel, in which it was alleged, that the plaintiff was tried for murder, and that "it was understood that the counsel for the prosecution were in possession of a damning piece of evidence, viz. that he had spent nearly the whole of the night preceding the duel in practising pistol-firing," and the plea stated that the plaintiff had committed murder, but did not show that he had practised pistol-firing the night before, it was held that the justification was insufficient. *Semble*, that a replication to such a plea by way of estoppel, stating that the plaintiff was tried and acquitted, is not good. *Helsham v. Blackwood*, 20 Law J. (N. S.) C. B. 187.

5. *Promissory note—Consideration.*—In an action by the payee against the maker of a promissory note, the defendant pleaded that it was made by the defendant at the request of the plaintiff, as a collateral security for a debt due from J. B. to the plaintiff, and that the defendant was not liable to pay the debt or to give the note as security, and that there was no other consideration: Held, a good plea of want of consideration, after verdict. *Crofts v. Beale*, 20 Law J. (N. S.) C. B. 186.

6. *Railway works—Powers of company—Obstruction of navigable river—Construction of 7 & 8 Vict. c. 20, s. 16.*—Case against a railway company for constructing a portion of their works upon a part of the bed of the navigable river Ouse, so as to prevent its flowing in its usual and accustomed channel, and to hinder the plaintiffs from passing and navigating their barges as they otherwise might and would have done. Plea, that the defendants had acted under their special act, the Lands Clauses Consolidation Act, and the Railway

Clauses Consolidation Act; that plans and sections and books of reference had been deposited with the clerk of the peace; and that, subject to the provisions in the above acts, the defendants were empowered to construct their railway in the line and upon the lands so delineated and described in the said plans and books of reference; and that the said part of the river was in the line and among the lands so described; and that the defendants did, for the purpose and under the powers mentioned in the said acts, construct a part of their railway upon the bed of the said river, the same being necessary for the purpose of making and maintaining the said railway, as they lawfully might, &c. Replication, *de injuriâ*: Held, that the defendants by their plea were not required to prove that they had taken all the preliminary steps necessary to vest in them the ownership in the bed of the part of the river in question, as in the ordinary case of lands purchased: held, also, on motion for judgment non obstante veredicto, first, that, as against the plaintiffs, who had no interest in the soil of the bed of the river, it was not necessary for the defendants to aver and prove that such preliminary steps had been taken; secondly, that the first clause in the 16th section of the Railway Clauses Consolidation Act applies to navigable rivers as well as rivers not navigable, and empowered the defendants to do the act complained of. *Abraham v. Great Northern Railway Company*, 20 Law J. (N. S.) Q. B. 322.

PRACTICE.—*Costs—Taxation.*—Where there are several defendants, who defend separately and obtain a verdict generally, the costs of all need not be taxed at the same time. *Brueford v. Griffin*, 20 Law J. (N. S.) Exch. 287.

PRISONER.—*Discharging defendant out of custody—Intention to take out letters of administration.*—The defendant was in custody under a judgment recovered by the plaintiff. The plaintiff had died previously in insolvent circumstances, leaving two infant children. As soon as the defendant heard of the plaintiff's death, he applied to be discharged out of custody. The plaintiff's attorneys resisted the application, alleging that they had advanced sums of money to the plaintiff, and that the plaintiff had agreed that they might retain these sums, together with their costs, out of the amount to be recovered by the judgment, and they expressed an intention of taking out administration to the plaintiff's estates. The court refused to discharge the defendant. *Cox v. Prichard*, 20 Law J. (N. S.) Q. B. 353.

PROHIBITION.—*County Court, jurisdiction of—Railway company.*—A railway company, by their special act, were entitled to charge a certain toll on carriages passing along their line. A coal owner having requested the company to convey along their line for him some coal trucks loaded with coals, the company refused to do so except on payment by him of the charge for the conveyance of the coals, and a further charge for the bringing back of the empty trucks. The coal owner declined to pay the latter charge before-

band, and sued the company in the County Court for the damages occasioned by their refusal to carry his coals. On the trial, the plaintiff contended that the company were not entitled to charge the toll beforehand, and also that coal-trucks were not carriages within the meaning of the act. The company urged that the County Court judge had no jurisdiction, as the title to a toll was in question. The judge gave judgment for the plaintiff. The company having applied for a writ of prohibition: Held, that the title of the company to take toll was not in question, and that the judge had jurisdiction to determine whether the company were justified in making that particular charge, and also to say whether the coal-trucks fell under the denomination of "carriages" in respect of which toll was payable. *Hunt v. Great Northern Railway Company*, 20 Law J. (N. S.) Q. B. 349.

PUBLIC MARKET. — *Demurrer.* — A person who exposes goods for sale in a public market, has a right to occupy the soil with baskets necessary and proper for containing the goods. Trespass for taking the plaintiff's goods, to wit, potatoes, baskets, &c. Pleas, first, that W. was possessed of a close called May-day Green, and because the goods were wrongfully upon the close, encumbering the same, the defendants, as the servants of W., took the goods and removed them; secondly, that T. was possessed of a close, part of land called May-day Green, and because the goods were wrongfully upon the last-mentioned close, encumbering the same, the defendants, the servants of T., removed them. Replication to first plea, that a market was held upon the close in which, &c., for the buying and selling provisions, and the plaintiff brought into the close in which, &c., into the market, the potatoes, for the purpose of selling the same, and also then brought the baskets, being necessary and proper for holding and containing the same, being no inconvenience to the holding of the market, when the defendants of their own wrong seized them. The replication to the second plea was in similar terms. Rejoinder to replication to first plea, that A., being seised in fee of the close called May-day Green, and also of the market, demised the close to W., and because the goods were wrongfully on the close, the defendants, as the servants of W., took and removed them. Rejoinder to replication to second plea, that A. being seised in fee of May-day Green, and also of the market, which was held as well upon the close in the second plea mentioned as upon other parts of May-day Green, demised to W. the said close and other parts of May-day Green; that W. demised the close, being such part of May-day Green, to T., for the purpose of erecting a stall thereon for selling goods in the market, the said close not being an unreasonable quantity of land for that purpose, and there being sufficient ground left for other persons resorting to the market; and because the goods were wrongfully placed on the close without the leave of T., the defendants, as her servants, took the goods and removed them: Held, on demurrer, that the rejoinders were bad, inasmuch as the demise to W. was subject to the right of market. *Townend v. Woodruff*, 5 Exch. 506.

RAILWAY COMPANY.—1. Agreement.—A railway company, duly incorporated by act of parliament, entered into an agreement, not under their seal, with a contractor, that he should execute certain works upon their railway, for the purpose of changing the system of locomotion which they then employed, the rope and stationary engine system to the ordinary locomotive principle. The contractor, in pursuance of the agreement, entered upon the works and performed a portion of them, but before they were completed he was dismissed by the company: Held, that he could not recover the value of this work. *Diggle v. London and Blackwall Railway Company*, 5 Exch. 442.

2. Compensation.—The words “lands which shall have been taken for or injuriously affected by the execution of the works,” in the 68th section of the Lands Clauses Consolidation Act, 8 Vict. c. 18, include such lands only as are actually taken or actually affected by the works. A., the proprietor of certain houses, which were liable to be taken for making a railway, under the provisions of the local act of the promoters of the undertaking, received a notice under the 18th section of the 8 Vict. c. 18, from the promoters, that the property would be required by them for the railway, and the notice demanded the particulars of A.’s interest therein, and stated their willingness to purchase it. A. duly furnished these particulars, and a sum of 4500*l.* was set upon the property by him, which amount he claimed from the promoters as a compensation for taking the property, and he required payment thereof, or that a warrant should be issued by the company to summon a jury to assess the proper amount under the provisions of the act. The company took no further step in the matter: Held, that under these circumstances, A. could not maintain an action to recover from them the 4500*l.* *Burkinshaw v. Birmingham and Oxford Junction Railway Company*, 5 Exch. 475.

RULE UNDER 11 & 12 VICT. c. 44, s. 5.—Where no cause is shown against a rule under the 11 & 12 Vict. c. 44, s. 5, the court will not make the rule absolute with costs, unless asked for by the rule. *Leamington Priors (Town of) Commissioners for Paving v. Moultrie and others*, 7 Q. B. Pr. 311.

SALE.—Sale to innocent vendee.—A sale of goods effected by the fraud of the buyer is not absolutely a void transaction, but the seller may elect to treat it as a contract. If he does not treat the sale as void before the buyer has resold the goods to an innocent vendee, the property will pass to that vendee. *White v. Garden*, 20 Law J. (N. S.) C. B. 166.

SETTING ASIDE RULE TO PLEAD SEVERAL MATTERS.—Court rescinds judge’s order.—Since the New Rules, which have prevented parties from pleading the general issue, the court has allowed more liberty than was given under the stat. 4 Anne, c. 16, s. 4, of taking many separate traverses of averments in the declaration.

But the practice is still to be restrained, on the principle formerly recognized, where the course of pleading manifestly tends to vexation. An action of debt was brought for compensation assessed by a sheriff's special jury, under the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18. The declaration stated that A., B., C., &c. and N., twelve persons in number, were by the sheriff duly chosen, tried and sworn to assess, and did assess, the compensation. Defendants pleaded, among other pleas, by leave of a judge and rule of court for pleading several matters, that A., B., &c., the first eleven persons abovenamed as jurors, and J. F., whose name was substituted by the plea for that of N., whereby the sheriff chosen, tried and sworn to assess, and whereby the jury lawfully chosen to assess, &c., without this that N. was duly chosen, &c., and sworn to assess, &c., or had any power to act as a jurymen on the inquiry. On motion to rescind the order and rule for pleading the matters of the several pleas, it appeared by affidavit that after twelve special jurors had been sworn to assess, &c., and before any hearing, one jurymen, N., became too ill to proceed, and was excused, and F. was sworn in his place and served with the other eleven jurors. This was objected to on the part of the defendants, but neither the jury nor any jurymen was challenged. The inquiry proceeded, and counsel on both sides were heard, and a verdict taken for the plaintiff. Costs were taxed before the Master, both parties attending. The defendants then moved for a certiorari to bring up the proceedings; a rule nisi was obtained, and discharged on argument. On receiving notice that an action would be brought, the defendant's attorney wrote an answer denying the plaintiff's right to recover. The defendants did not, in any of these proceedings (except on the inquiry as above stated) intimate an objection to the jury, as improperly constituted: Held, under these circumstances, that the above plea, pleaded with others, was vexatious, and a perversion of justice; and the court rescinded the judge's order under which it was pleaded, and compelled the defendants to elect whether the above or the other pleas on the record should be retained. *Cooling v. Great Northern Railway Company*, 15 Q. B. 486.

SHERIFF.—*Escape*—5 & 6 Vict. c. 98, s. 31—*Damages*.—In an action against the sheriff, in which the damages for the escape of an execution debtor were to be assessed upon the same principle as in an action under the 5 & 6 Vict. c. 98, s. 31: Held, that the true measure of damages is the value of the custody of the debtor at the moment of the escape, and that no deduction ought to be made on account of anything which might have been obtained by the plaintiff by diligence, after the escape. *Arden v. Goodacre*, 20 Law J. (N. S.) C. B. 184.

SLANDER.—*Privileged communication*—*Words spoken in presence of third party*.—The defendant having a suspicion that the plaintiff, who was his shopman, had in one instance embezzled money, sent for him, and in the presence of A. B. charged him with

embezzlement, and at the same time discharged him from his service. After his discharge, the plaintiff being about to enter into a fresh service, referred to the defendant for a character, but in consequence of what the defendant said, his intended master refused to engage him. Upon this the plaintiff's brother called upon the defendant and inquired why he had given the plaintiff such a character as prevented him from getting a situation, and in answer to these inquiries the defendant said, he has robbed me; I believe he has robbed me for years past; I can prove it from the circumstances under which he has been discharged by me: Held, that the occasions upon which each of these statements was made rendered them privileged communications, and that the fact of the first charge being made in the presence of a third party, did not warrant the judge in leaving the question to the jury, and that the excess of the defendant's statement on the second occasion did not raise any presumption of express malice. *Taylor v. Hawkins*, 20 Law J. (N. S.) Q. B. 313.

USE AND OCCUPATION.—An action for use and occupation under the statute 11 Geo. 2, c. 19, s. 14, does not lie where there has not been an actual entry by the lessee. *Lowe v. Ross*, 5 Exch. 553.

WITNESS.—*Commission to examine witnesses abroad.*—Where a commission had issued to a foreign country, requiring the commissioners to be sworn and to administer an oath to the witnesses, and depositions had been taken by the commissioners and returned, but no oath had been taken by the commissioners or witnesses, owing to a law of the foreign country that burgomasters alone should administer oaths, and that no voluntary oath should be taken, a new commission was ordered to be issued to burgomasters to examine the witnesses, without requiring the burgomasters to be sworn. *Bolin v. Melliden*, 20 Law J. (N. S.) C. B. 172.

CRIMINAL AND MAGISTRATES' CASES.

CONTAINED IN

20 Law J. (N. S.) part 8.

LUNATIC PAUPER.—*Costs of maintenance — Order on union.*—The 12 & 13 Vict. c. 103, s. 5, providing that the costs and expenses of the removal and maintenance of a lunatic pauper removed to any asylum, and who, if not a lunatic, would have been exempt from removal under the 9 & 10 Vict. c. 66, shall be borne by the common fund of the union comprising the parish where such lunatic was resident when removed to the asylum, applies to an union formed under Gilbert's Act, 22 Geo. 3, c. 83. *Reg. v. Priest Hutton (Inhabitants of)*, 20 Law J. (N. S.) M. C. 226.

3. *Order of maintenance—County of a city*—8 & 9 Vict. c. 126, ss. 62, 84.—The court will take judicial notice that the city is a county of a city. Where, therefore, an order for the payment of the expenses and maintenance of a lunatic pauper was expressed throughout to be made by two justices of the peace “in and for the city of York:” Held, that such was valid, under the 8 & 9 Vict. c. 126, s. 62, the word “county” in that section being, by the 84th section, interpreted to mean “county of a city.” *Reg. v. St. Maurice*, 20 Law J. (N. S.) M. C. 221.

EQUITY.

Comprising the Equity Cases contained in the following Reports :—

13 Beavan's Reports, part 1.	8 Hare, part 1.
14 Beavan's Reports, part 1.	2 Mc Naughten & Gordon, part 3.
3 De Gex & Smale, part 2.	1 Simons, part 3.
20 Law Journal (N. S.) part 8, 9.	

ACCOUNTANT-GENERAL.—Where a matter is pressing, the Accountant-General will grant his direction to pay money into the Bank instant. *Foley v. Smith*, 13 Beav. 113.

AGREEMENT.—*Injunction.*—Injunction to restrain the defendants from entering into an agreement with another railway company, which would be a violation of or inconsistent with a subsisting agreement between the plaintiffs and the defendants, refused; the inconvenience to arise from granting the injunction being greater than the inconvenience to arise from refusing it. In what cases the court will interfere to preserve property in litigation in statu quo. *Shrewsbury and Cheshire v. Shrewsbury and Birmingham Railway Company*, 1 Sim. 410.

CHARITY.—*Trustees.*—*Church Building Act.*—The right of selecting new trustees of a parish charity held to belong to the rate-payers in vestry, and not to the surviving trustees. In 1671 an estate was purchased out of parish funds, and was conveyed to the rector, churchwardens and twelve parishioners, for the relief of the poor inhabitants. The deed was lost. New trustees were appointed by deed, dated in 1701, which recited that the deed of 1671 provided that when the trustees were reduced to five, they should convey the premises to themselves and eleven other parishioners. In 1725, 1769, 1782 and 1806 new trustees were appointed by the parishioners; but the deeds executed in 1769, 1782 and 1806, contained a proviso that the new trustees should be nominated by the five survivors. In 1831 and 1842 new trustees were appointed by the old trustees. The legal estate was presumed to be vested in the persons to whom it was purported to be conveyed, notwithstanding some irregularities. Special directions were asked to be given to the Master as to taking the provisions of the Church Building Acts into consideration in settling the scheme, the parish being divided into eight separate districts, and the money being to be distributed by the rector and churchwardens; and it was also asked, that directions should be

given as to the mode of distribution in each district of the portion allotted to it. The former was refused, and it was held, that the Master could take the latter into consideration without any special direction. *Attorney-General v. Dalton*, 13 Beav. 141.

CLAIM.—1. Parties.—*17th, 18th and 32nd orders of August, 1841.*—If, at the hearing of a claim, it will be necessary for the court to direct special inquiries, and the claim does not contain any specific statements upon which to ground those inquiries, the claim will be dismissed. In a legatee's claim against a surviving executor, who denies assets, the representatives of the deceased co-executors are necessary parties. Observations on the 8th Order of April, 1850, as to parties necessary to be named in a claim in the first instance. Construction of the 32nd Order of August, 1841. *Penny v. Penny*, 20 Law J. (N. S.) Chanc. 339.

2. Statute of Limitations.—A testator by his will devised his real estate to A. and B. on the usual trusts for sale, and directed them to pay a share of the purchase monies to A. The testator died in February, 1816, and A. and B. proved the will. A. died in October, 1817; B. died in 1849, having appointed C. his executor. Letters of administration of A.'s estate were granted to D. in June, 1850. A claim filed by D., the administrator of A., against C., the executor of B., in respect of the share of the purchase monies of the testator's estate given to A., was dismissed, with costs, but without prejudice to a suit. Whether the produce of real estate directed to be sold is a sum charged upon or payable out of land within the meaning of the 40th section of the Statute of Limitations (3 & 4 Will. 4, c. 27), *quære*. *Pawson v. Barnes*, 20 Law J. (N. S.) Chanc. 393.

CLAIMS.—Evidence.—Plaintiff's affidavit.—A plaintiff's affidavit in support of a claim will be treated as evidence, where there is no opposition or conflict of affidavits. *Shardlow v. Gaze*, 20 Law J. (N. S.) Chanc. 395.

CLASS.—Affidavit.—A class of children being interested, the court, instead of directing the preliminary class inquiry, received the affidavit of the parents proving the class, and then allowed the cause to be heard. *Bush v. Watkins*, 14 Beav. 33.

COMMON CLAIMS.—Special claim.—Legacy and interest.—Where a question, which ought to have been made the subject of a special claim, is brought before the court on a common claim, the court will give leave to have it filed as a special claim *nunc pro tunc*. A testator bequeathed a legacy, payable to the legatee at the age of twenty-one, with interest from his death, and died in 1840. The legatee attained the age of twenty-one in 1850, and filed a common claim for the legacy, with interest from her majority, and obtained a decree for the payment of the amount claimed, and received the money. The legatee afterwards, having discovered that she was entitled to interest from the testator's death, filed another common claim for this interest: Held, that she was entitled to this interest,

but that she ought to have it as the subject of a special claim. *Matthens v. Pincomb*, 20 Law J. (N. S.) Chanc. 395.

COMMON INJUNCTION.—Where the common injunction has been dissolved on the merits in the answer, and the bill is afterwards amended, a like injunction cannot be obtained as of course, for want of appearance to the bill amended. *Zulueta v. Vincent*, 14 Beav. 2.

COMPANY.—1. *Contributory.*—By the deed of settlement of a public company, the directors had a power of pre-emption of shares, at a price to be ascertained from the last sales appearing in “the transfer register book,” and then, “but not before,” all future liabilities of the vendors are to cease. In 1840 the directors purchased for A. B. a number of script shares; but having kept no such book, the specific directions were not and could not be followed. The company was afterwards wound up, when it was sought to charge A. B. as a contributory; but, Held that the company was not entitled to treat the transaction as void, by reason of the non-observance of the forms, which their own irregularity and neglect had made it impossible to observe. Held, also, that script shares were not inalienable. *Bogge, Ex parte, Northern Coal Mining Company, In re*, 13 Beav. 162.

2. *Liability.*—By a deed of settlement of a public company, it was provided, that the company was to continue forty years: “that the shares of deceased proprietors should belong to their personal representatives; but that executors should never be deemed proprietors until they should be duly admitted proprietors, on the approval by the directors, and had executed the deed, &c., and then, but not before, they were to become proprietors, and entitled to receive the dividends:” Held, that upon the death of a proprietor his estate continued liable, until a new personal liability had been created pursuant to the deed. *Northern Coal Mining Company, In re, Blakeley’s case*, 13 Beav. 133.

CONSTRUCTION.—Devise to trustees and their heirs upon divers trusts in succession, some requiring the legal estate to remain in the trustees, and others, which in themselves would not do so, the whole legal fee remains in the trustees. *Brown v. Whiteway*, 8 H. 145.

CONTRACT.—*Specific performance.*—Disputes having arisen between a railway company and a contractor employed in making the railway, the company insisting upon a right under the contract, owing to the alleged default of the contractor, to discharge him, take possession of the line and materials, and complete the works themselves; and the contractor resisting such claim, imputing the backward state of the works to the acts of the company, and holding forcible possession: collisions occurring between the workmen of the two parties, each being charged with impeding the operations of the other; and the completion and opening of the railway for traffic being in the meantime delayed, the court, on the application of the

company, restrained the contractor from continuing on the line or interfering with the operations of the company, directed an account of what was due to the contractor for works and materials done and provided, without regard to the formal certificates of the company's engineer, and an issue to try whether the company, at the time they proceeded to enter upon the works and remove the contractor, were lawfully justified in so doing; reserving as well the question of the right of the contractor to compensation for loss of profit on unexecuted works, as all other directions, until after the trial and the report. Consideration of the principle on which the court may, in certain cases, interpose to prevent a contract from being performed in specie; protecting the legal or supposed legal right of the party seeking such assistance, and preserving to the other party the substantial benefit of the specific performance. *East Lancashire Railway Company v. Hattersley*, 8 H. 72.

COPYRIGHT.—5 & 6 Vict. c. 45.—*Contract for payment.*—Under the act to amend the law of copyright, 5 & 6 Vict. c. 45, actual payment for an article written for a periodical work, is a condition precedent to the vesting of the copyright in the article in the proprietor of the work: a contract for payment is not sufficient. *Richardson v. Gilbert*, 1 Sim. 336.

DECREE.—*Arrears of maintenance.*—Where the court orders payment out of a particular fund, it is tantamount to a decision, not only that such fund is liable to make such payment, but also the interest directed to be computed thereon. By the decree, arrears of maintenance were ordered to be paid out of a fund in court consisting both of corpus and rents of real estate, and it was referred to the Master to calculate interest on the arrears. Upon the matter coming before the court upon the Master's report: Held, that it was not then competent for the parties to contend that the arrears and interest were not payable out of the corpus, for the point must be considered settled by the prior decree. *Davis v. Browne*, 14 Beav. 127.

DEVISE.—*Will, construction of.*—A testator, W., devised his real estates to trustees, upon trust to receive the rents, and, on his son John arriving at the age of twenty-five years, to let him into possession; but neither he nor his heirs to the third generation were to sell or mortgage the same, it being the testator's desire that the property should remain in the W. name. If John should die without leaving lawful issue, it was the testator's will that his daughter Ann should have his share, subject to the same limitations. If John and Ann should die under age, or without leaving issue, the testator devised the property, after deducting a certain sum from the produce in favour of his (the testator's) daughter Elizabeth, to and for the benefit of the plaintiffs. The testator had the three children named in his will living at his death, and no more. Elizabeth died at the age of two years; Ann survived her, and died at the age of nineteen years, unmarried; and John, the last survivor, died aged thirty years, leaving children, who all died unmarried, and without issue. John by

his will devised part of the father's real estate to the defendants: Held, first, that the devisees of John, the son, took no estate in the hereditaments of W., the father, devised by his will; and secondly, that the plaintiffs took the estates in the hereditaments of W., the father, and in such manner as given them by the will of W., the father. Where there is a doubtful question as to the legal title to an estate on the construction of a will, the practice is not to determine it on demurrer, although the inclination of the court may be in favor of the defendant, but to overrule the demurrer, without prejudice to the defendant's insisting on the same matters by way of answer. (*Brownsword v. Edwards* referred to on this point.) *Mortimer v. Hartley*, 3 De Gex & S. 316.

DISCOVERY.—1. Order upon motion before the hearing, that the plaintiffs and their witnesses should be allowed until publication to view and inspect the workings by the defendants in the plaintiff's mine, of which the defendants were lessees, and which mine was entered and worked by means of a shaft in an adjoining mine belonging to the defendants. *Lewis v. Marsh*, 8 H. 97.

2. Where the respective titles alleged by the plaintiff and defendant were antagonistic, the plaintiff claiming the reversion in lands alleged to be in the possession of the defendant as lessee, and the defendant claiming to be entitled in fee to such lands, but admitting that he derived his title under a person alleged by the plaintiff to have been lessee only, and that the parcels mentioned in the deed under which he claimed, in some respects, although not wholly, corresponded with the parcels described in the demise to such alleged lessee: it was held, that the plaintiff was entitled to a discovery of such parcels, and to a production of so much of the purchase deed as described them. A plaintiff is not entitled to discovery of documents, the right to the possession or inspection of which is not necessary to the proof, and is only consequential upon the existence of the title he claims, that title not being admitted; but where the court finds upon the answer, that, although the title of the plaintiff is not admitted, the question as to the existence of such title is a question to be tried, the plaintiff is entitled to the discovery and production of particulars material to establish his case on such trial. Considerations of the limits of the right to discovery, in cases of adverse title, of the deeds and evidences in the possession of the defendant. *Attorney-General v. Thompson*, 8 H. 106.

DISMISSING FOR WANT OF PROSECUTING.—*Replication.*—A bill of 1500 folios was filed in February, 1850, and the answer of 900 folios was filed in June. On motion to dismiss in January, 1851, the plaintiff desired time to amend: Held, that the delay was inexcusable, and the bill must be dismissed, unless the plaintiff filed his replication forthwith. *Thruston v. Smith*, 13 Beav. 112.

DOMICILE OF SUCCESSION.—*Domicile of origin—Acquisition and change of domicile—Exceptions.*—J. G. B. was born

and educated in Scotland of Scotch parents. In 1780 he went to the East Indies, where he remained as a surgeon in the East India Company's service until 1804, when he came to England on leave of absence, but never returned to India; and in 1809 he retired from the Company's service upon a pension, and on the pay of his rank. For two years after leaving India he resided near London; but he made donations to various institutions in Scotland. At the end of 1806, he went to Edinburgh, and embarked in the business of a banker; he purchased a house there, and married, and caused his mother to return from abroad to Scotland. In 1815 his affairs became embarrassed. In 1817 he came to London, and continued to reside in England till 1828, occupying furnished lodgings. He caused his residence and furniture in Edinburgh to be sold, and his books to be sent to London, and occupied himself in the sale of various oriental works, of which he was the author, and in lecturing on Hindostanee and the eastern languages, chiefly under the auspices of the East India Company. Between 1817 and the time of the death of the testator, he also projected various undertakings, of which he was to be the director, and resided in London. He paid three short visits to Scotland, and in 1825 returned to England; but in 1834 he again visited France, and remained for longer periods than at first; and in 1837 he took a lease of some premises in Paris for a term of years, in which he resided, occasionally visiting England, and in which he died on the 8th of January, 1841, having executed a will according to the laws of England, in which he described himself as of Edinburgh. Upon exception to the Master's report, finding that the testator's domicile was in England: Held, that in 1817 the testator was domiciled in Scotland; that he subsequently became domiciled in England, and was so in 1827; and that it was not changed at the time of his death; and the exceptions were overruled. *Whicker v. Hume*, *Hume v. Gilchrist*, 20 Law J. (N. S.) Chanc. 369.

EVIDENCE OF DEFENDANT.—1. In a pressing case an affidavit was allowed to be sworn in open court. *Mercers' Company v. Northern Railway Company*, 14 Beav. 20.

2. 6 & 7 Vict. c. 85.—The evidence of a defendant in favour of a co-defendant is inadmissible under the 6 & 7 Vict. c. 85, if it proves the case of the witness himself. The cross-examination of a defendant, tendered as a witness, is a waiver of his incompetency, where the objection must be assumed to have been known at the time of the cross-examination. *Triston v. Hardy*, 14 Beav. 21.

EXAMINATION OF PLAINTIFF.—*Vivâ voce*.—Application to examine a plaintiff *vivâ voce* in the Master's office refused. *Wood v. Homfray*, 14 Beav. 7.

EXAMINATION OF WITNESSES.—*Commissioners—Fees—Depositions.*—In the absence of a special agreement, a commissioner for the examination of witnesses will not be required to file the depositions taken in the cause without payment of his fees. *Peters v. Beer*, 20 Law J. (N. S.) Chanc. 424.

EXECUTOR INDEBTED TO TESTATOR'S ESTATE.—

Power to select particular legacies for payment—Will—Replication.
 —An executor indebted to his testator's estate creates a charge on his (the executor's) own freehold estate in favour of his wife and children to the amount specified in the testator's will, as part of their share of his residuary estate: Held, that the wife and children were entitled to the benefit of the charge, although the debt due to the testator's estate remained unpaid. A codicil does not for all purposes republish a will, so as to make it speak at the time of the testator's death. A receiver ought not to present a petition to be discharged, to come on with the cause on further directions, as the court would make the order on further directions without any such petition. *Stilwell v. Mellersh*, 20 Law J. (N. S.) Chanc. 365.

GUARDIAN.—Infants—Mother.—The court will not appoint a mother to be the guardian of her children, without having some information as to the family of the father. *Cook, In re*, 20 Law J. (N. S.) Chanc. 392.

HUSBAND AND WIFE.—Redemption, suit for—Mortgagee.

—A husband and wife, by deed acknowledged, demised freeholds of the wife to a mortgagee by way of trust, the trusts being to apply the rents and profits in payment of certain premiums on insurance, and of the interest on the mortgage debt, and then in reduction of the principal, until it should be paid off. The husband took the benefit of the Insolvent Act: Held, in a suit for redemption, instituted by the assignee in insolvency against the mortgagee, that the latter was chargeable with the surplus rents, which he permitted to be received by the insolvent's wife for her maintenance, the principles established by *Sturgis v. Champneys* not extending to such a case. But there being ground for supposing that the court would have made such a provision for the wife, the court, although the balance was found against the mortgagee, decreed payment without costs. *Clark v. Cook*, 3 De Gex & S. 333.

INFANT.—Past maintenance.—A petition was presented by an infant, who had for some years been entitled to property amounting to 290*l.* per annum. The petitioner had been maintained by his father, who had incurred a large debt for the purpose, and was unable any longer to maintain his son. The petition stated that the father had been resident for many years in India, and it asked for a sum of 300*l.* for past maintenance: Held, that the father having resided out of the country, and being unable to apply to the court before, was a special circumstance, which would enable the court to grant the sum required for past maintenance. *Carmichael v. Hughes*, 20 Law J. (N. S.) Chanc. 396.

INFANTS.—Guardian.—Petition.—A petition by infants for the appointment of a guardian ought to be presented by them by their next friend. *Russell's Estate, In re*, 20 Law J. (N. S.) Chanc. 384.

INJUNCTION.—1. Compensation.—Held, notwithstanding the

decision in the London and North Western Railway Company v. Smith, that a person who has served a railway company with notice, under the 68th section of the Lands Clauses Act, claiming compensation on the ground that his land has been injuriously affected by the execution of the company's works, ought not to be restrained from proceeding pursuant to his notice. *South Staffordshire Railway Company v. Hall*, 1 Sim. 373.

2. *Motion.—Negotiation.*—Where there has been great delay, the court will not, on the eve of trial, extend the common injunction. The dates of the proceedings were as follows: action, 30th of June; declaration, 12th of July; plea, 6th of August; notice of trial, 25th of November; bill filed, 26th of November; motion to extend injunction, 21st of January following. The motion stood over for an arrangement without prejudice, and with an understanding that the answer should not be pressed for; the negotiation terminating on the 7th of June, and the motion was renewed on the 19th of June, the trial being fixed for the 22nd. The court thought that if the case was to be decided as on the 21st of January, the motion ought to be refused; but that as matters now stood, the plaintiff was taken by surprise and the motion was granted. *Bewley v. Hancock*, 13 Beav. 75.

3. *Partnership.—Appointment by deed of a party.—Dismissal.—Equity.*—A. being entitled to certain letters patent, for a money consideration granted an exclusive licence to B. & Co. for the whole of the term; and by deed covenanted with B. & Co. to serve them as manager of the business for the same period, with power to B. & Co., in case of the bankruptcy or insolvency of A., or breach of the covenants on his part, to determine the engagement by notice in writing. B. & Co. covenanted with A. that each of the partners would diligently employ himself in the business, and that A. should have the management thereof under their directions; that if A. should have duly observed the covenants B. & Co. would pay him a gross sum of money at the expiration of the licence; and further, by way of salary, such a sum of money every quarter day as should be equal to 40l. per cent. of the net proceeds of the business, and in case of A's. death before, would pay his executors, during the remainder of the term, 30l. per cent. upon the net profits; and it was provided that, in case B. & Co. discontinued the business, A. should have the option of purchasing their interest in the licence and the stock, &c. but that nothing therein contained should constitute A. a partner. After the business had been carried on for a time under this arrangement, B. & Co. discharged A. from being manager on the ground of neglect, who thereupon filed his bill, praying that B. & Co. might be enjoined from excluding him from the management, and for an account: Held, upon appeal, that the interest of A. was not that of a partner in the concern, and that he had no equity; and an injunction before the hearing granted by the court below was discharged. Observations as to the style and character of affidavits. *Stocker v. Brockelbank*, 20 Law J. (N. S.) Chanc. 401.

JOINT-STOCK COMPANIES WINDING-UP ACTS.—

1. The Master ought not to make a call on any contributory, until he has ascertained that the contributory is liable to pay the debt or debts in respect of which the call is made. *Upfill's Case*, 1 Sim. 395.

2. The Master certified that he had included A's. name in the list of contributories, not as a shareholder, but as a contributory, in respect of any expenditure which he might be proved to have incurred. The court held the certificate to be informal, and directed the Master to review his certificate, with liberty to either party to adduce further evidence. *Riddell's Case*, 1 Sim. 402.

3. *Certificate of scrip*.—A. consented to his name being placed on the list of the provisional committee of a company as an ornamental member, and to take such number of shares in the company as might be allotted to him. Afterwards the managing committee allotted him twenty-five shares. The letter of allotment stated that on payment of the deposits, the receipts must be exchanged for a certificate of scrip, which would be granted on the due execution of the subscribers' agreement and parliamentary contract, without which no person would be recognised as a subscriber, or to be entitled to any interest in the undertaking. Those instruments were never engrossed; and consequently A. never executed them. He, however, paid the deposits on the twenty-five shares; but not until after the undertaking had been abandoned. The Master struck A's. name off the list of contributories; but the court ordered it to be restored. *Direct Shrewsbury and Leicester Railway Company, Winding up of; Brittain. Ex parte*, 1 Sim. 281.

4. *Liability of contributories*.—No order ought to be made for a call upon the contributories of a provisionally registered company, on account of the costs of winding up the company, until the liabilities of the contributories have been ascertained, or at least till the Master has ascertained the liability of the contributories to the costs in respect of which the call is made. The contributories of a provisionally registered company are not liable, in proportion to the number of their shares, to the costs of winding up the company: *semble*. *Hunter's Case*, 1 Sim. 435.

5. *Provisional committee*.—The secretary to a company wrote to A., a member of the provisional committee, informing him that the managing committee had apportioned one hundred shares to each member of the provisional committee, and requesting to be informed, on or before a certain day, whether A. would take that or any less number of shares, otherwise the committee would consider that he declined taking any. A., in answer, requested that the one hundred shares might be reserved for him. The court directed an issue to try whether A. had accepted the shares. *Anion's Case*, 1 Sim. 395.

6. *Demurrer*.—An incorporated railway company issued new shares, in pursuance of a resolution declaring the purpose of such new issue to be the raising of a sufficient amount to pay off the existing mortgage and bond debts of the company. The holder of some of the new shares filed a bill, on behalf of himself and other holders

of the shares, against the directors and the company, alleging facts to show, and charging, that they were about to apply the money paid in respect of the shares otherwise than in conformity with the resolution, and praying for a declaration that the money ought to be applied according to the terms of the resolution, and for a specific performance of the agreement thereby entered into, and for an injunction: Held, allowing demurrers of the directors and the company, that the case fell within the authority of *Mozley v. Alston*; but the costs of only one demurrer were allowed. *Yetts v. Norfolk Railway Company*, 3 De Gex & S. 293.

JURISDICTION.—7 Ann. c. 20.—*Unregistered conveyance.*—A conveyance of lands in Middlesex by settlement upon the marriage of the settlor, registered under the statute 7 Ann. c. 20, is effectual against a prior unregistered conveyance, notwithstanding the party claiming under the settlement had notice of the unregistered conveyance after the marriage, but before the registry of his settlement. A party having a legal title may sustain a bill in equity to recover deeds, without first having established his title at law, where a deed to be recovered would be the proper evidence in a trial at law, to enforce the legal right against the tenant in possession of the property in question, and that notwithstanding the evidence furnished by the deed might have been obtained by means other than a suit in equity. Decree as between the claimant of property and the trustee who claimed to hold the same property in trust for an infant defendant, reserving the right of the infant defendant. Position, duty, and liability of a trustee for infants of an estate created by an invalid deed, or a deed of doubtful validity, and which is impeached by other parties. *Elsey v. Lutyens*, 8 H. 159.

LANDS CLAUSES CONSOLIDATION ACT.—*Compensation and damages.*—The owner of certain land required by a railway company, on being served with the usual notice, stated his desire to have the amount to be paid to him for compensation and damages settled by arbitration under the provisions of the Lands Clauses Consolidation Act, 1845. Arbitrators were accordingly appointed by the landowner and the company, and, these arbitrators not being able to agree upon an umpire, an umpire was ultimately appointed by the commissioners of railways. In the meantime the company having paid into the Bank the amount claimed by the landowner, and having given the bond required in such cases by the act, entered upon the land. The arbitrators not having made their award in time, the questions of compensation and damage came before the umpire, who made his award, giving the landowner a much less sum than that claimed by him from the company. The landowner having refused to deliver an abstract of title, or to take any steps for conveying the land, the company proceeded under the provisions of the act applicable to such a case, and paid into the Bank the sum awarded by the umpire. They then presented a petition for payment out of the Bank to them of the sum paid in by them before

taking possession of the land. The landowner in the meantime had taken proceedings at law to set aside the award on various grounds, but without success, and was at the time when the petition was presented prosecuting an action against the company to recover the amount originally claimed by him. Under these circumstances the landowner opposed the petition of the company; but the Lord Chancellor made the order prayed, holding that the landowner was not entitled to avail himself of the security provided by the act in the deposit of the money, and at the same time to repudiate the proceeding, the benefit of the result of which it was the object of the act thus to secure him. *Fooks, In re*, 2 M. & G. 357.

LAPSE OF TIME.—A testator, who died in 1796, gave his personal estate to his widow for life, with remainder to B. B. died in 1826, and the widow in 1849. The plaintiffs then filed a bill against the representatives of the executors, to make them liable for investing in Five-per-Cents. instead of in Consols, &c. In 1837, the plaintiffs had notice of the state of the investment: Held, that they were barred by laches and lapse of time. *Brown v. Cross*, 14 Beav. 105.

LEGACY.—*Next of kin.*—Bequest to A. B. for life, and afterwards to her children; but in default of children, “to pay or assign and transfer” to C. D., if living; but if dead, to his next of kin ex parte maternâ. C. D. died before A. B.: Held, first, that the next of kin were to be ascertained at the death of C. D., and not of A. B.; and secondly, that the next of kin ex parte maternâ were not excluded because they also filled the character of next of kin ex parte paternâ. The word “then” construed as pointing to the event, and not to the time. *Gundry v. Pinniger*, 14 Beav. 94.

MORTGAGE.—1. *Bill of foreclosure.*—Upon a bill of foreclosure by first mortgagee, there was a contest between the defendants, the puisne mortgagees, as to their retrospective priorities. The court held, that it must in the first instance direct an inquiry. *Duberly v. Day*, 14 Beav. 9.

2. *Costs.*—Even in the case of infants, the court will only extend the time for payment of the mortgage money upon the terms of immediate payment of the interest and costs. *Coombe v. Stewart*, 13 Beav. 111.

3. *Inquiry.*—On a bill by first mortgagee against mortgagor and second mortgagee, the plaintiff should prove the second mortgage, otherwise he can only take an inquiry at the first hearing. *Guardner v. Boucher*, 13 Beav. 68.

MORTGAGOR AND MORTGAGEE.—The time fixed by the decree in a foreclosure suit, for payment of principal, interest and costs, enlarged by the Vice-Chancellor, notwithstanding the decree had been made absolute, and the order absolute had been signed and enrolled. *Thornhill v. Manning*, 1 Sim. 451.

PARENT AND CHILD.—*Advancements.*—When a father purchases property with his own money, and takes a conveyance in

the name of his son, the law presumes it to be an advancement for the son, and not a trust for the father. Those who allege that it is a trust are bound to prove it, and the evidence for that purpose consists mainly, if not exclusively, of contemporaneous circumstances. A testator had transferred property into the names of his sons: Held, that they were advancements; but there being doubts as to his solvency at the time, inquiries were directed on the point. *Christy v. Courtenay*, 13 Beav. 96.

PAROL TRUST.—A woman, a few days before her marriage, and without the knowledge of her intended husband, transferred a sum of stock to trustees upon a parol trust, as alleged by the trustees, for her separate use for life, and after her death for the benefit of her children. The fact of this transfer became known to her husband some time after the marriage. The dividends were received by the wife from the date of the marriage until her death, which took place seventeen years after. After her death the husband filed a bill, praying a transfer of the stock, and containing a statement that the dividends were duly paid to the wife during the coverture: Held, under the circumstances, that the husband was precluded from asserting his claim to the stock, as having been transferred in fraud of his marital right. *Loader v. Clarke*, 2 M. & G. 882.

PARTITION.—The partition of a manor may be compelled in equity. *Hanbury v. Hussey*, 14 Beav. 152.

PARTNERSHIP ACCOUNTS.—*Surviving partner.*—Where the accounts of a partnership between two had been carelessly kept, and after the death of one the other furnished to the executors of the deceased partner an account current of the partnership dealings, which afforded them the only evidence to charge the surviving partner: Held, that they were entitled to use it for that purpose in a suit instituted by the surviving partner to have the accounts taken, without being bound by the entries on the credit side of the account current. *Morehouse v. Newton*, 3 De Gex & S. 307.

PAYMENT OF DIVIDENDS.—*Estate for life—Prospective order—Evidence.*—The dividends of a sum of stock were ordered upon petition to be paid to A. for her life, and after her decease to B. for her life; but an order for the transfer of the fund, after the death of the survivor of them, was refused. The dividends of a small sum of stock, arising from the purchase money of real estate taken by a railway company, were ordered to be paid to a party claiming under a will, upon production of the probate copy, with an affidavit that it had been examined and was correct. *Lowndes's Trust, In re*, 20 Law J. (N. S.) Chanc. 422.

PETITION OF RIGHT.—*Indorsement.*—When a petition of right is referred to the Lord Chancellor with the indorsement "let right be done," if such right, supposing it to exist, be subject to certain rules of proceeding for its ascertainment and enforcement, those rules must still be followed, and the rights of the parties will

be bound by all equities to which they are properly subject.—*Monckton v. Attorney-General*, 2 M. & G. 402.

PLEA.—*Bill of revivor.*—Upon the death of a defendant, her representatives were made parties to a bill of revivor. They pleaded that the testatrix had assigned pendente lite, and that they never had any interest in the subject-matter of the suit. The plea was allowed. *Nutting v. Hebden*, 14 Beav. 11.

PLEA OF SUBSEQUENT BANKRUPTCY.—*Transfer.*—To a bill for specific performance, a plea by a sole defendant of his bankruptcy, subsequent to the bill filed, was allowed. By a local and personal act, transfers of debentures were to be by indorsement by deed and in a given form, and were to be entered in the books of the company, and “after such entry, but not till then, the assignee was to be entitled to the benefit:” Held, that this did not apply to a transfer by act of law, as in the case of bankruptcy. *Lane v. Smith*, 14 Beav. 49.

PLEADING.—1. Prolivity in setting out at length, in a petition or other pleading, clauses of a public statute.—*Manchester and Leeds Railway Company, In re, Ex parte Osbaldiston*, 8 H. 31.

2. In the joint answer of a husband and wife to a creditor’s bill, for payment out of an estate of which the wife was the administratrix, the wife alone set up the Statute of Limitations as a defence to the suit: Held, that the interest of the wife was not so merged in the coverture that the court would disregard her separate defence, and that the statute was, for the protection of the estate, sufficiently pleaded by the wife alone. *Beeching v. Morphen*, 8 H. 129.

3. *Demurrer—Amended bill.*—The 37th General Order of August, 1841, although it removes the technical objection, that an answer to matters covered by a demurrer overrules the demurrer, yet does not enable a defendant, who has answered an original bill, to demur to an amended bill, upon any cause of demurrer to which the original bill was open. *Attorney-General v. Cooper*, 8 H. 166.

4. *Parties—Misjoinder of plaintiffs—Costs.*—One of several cestuis que trust, who is also the personal representative of a deceased defaulting trustee, cannot be joined as co-plaintiff with the other cestui que trust in a bill to charge the estates of the other deceased co-trustees with the loss of the trust funds; such bill will be dismissed for misjoinder, with costs as to the defendants who raised the objection by answer, and without costs as to all the other defendants. In a suit so framed, the defect was first disclosed by amendment to the original bill, and the newly-appointed trustees, against whom no relief was prayed, did not insist upon the objection, either by their answer or at the hearing, and were desirous that the suit should proceed. The bill was, notwithstanding, dismissed as against them, without costs. *Griffith v. Heythuysen*, 20 Law J. (N. S.) Chanc. 337.

POWER.—*Default of appointment—Joint and separate powers of appointment.*—By the settlement made on the marriage of A. and

B., certain real estates were conveyed to trustees upon trust to pay the rents to A. for life, and, after his death, to B. for life, and after the death of A. and B., upon trust for such one or more of the children of the marriage as A. and B. should by deed jointly appoint; and in case of the death of A. in the lifetime of B., before any such appointment should be made, as B. should by deed appoint. A. and B. jointly appointed two-fourths of the estate to two of their children. A. died: B. appointed the other two-fourths to two other of the children: Held, that the appointments made by B. alone were valid. *Simpson's Settlement, In re*, 20 Law J. (N. S.) Chanc. 415.

POWER OF APPOINTMENT.—*Reversionary fund.*—An appointment to one of a class of a part of a fund as “her part, share and proportion,” does not prevent her participating in the unappointed fund, limited to the class equally in default of appointment. A mother had a power of appointing a reversionary fund to her daughters. A daughter, who was under age, being about to marry, the mother appointed that a moiety of the fund should on the marriage become the portion of the daughter, and be vested in her or her intended husband in her right, and to be paid to the husband, his executors, administrators or assigns, on the death of the tenant for life: Held, although the husband was not an object of the power, and the fund was reversionary, and the daughter an infant, there was a valid appointment. *Wombwell v. Hanrott*, 14 Beav. 143.

PRACTICE.—1. *Bill of revivor.*—The court gave some of the defendants the option of taking an issue on a question of fact arising in the cause, and dismissed the bill against another defendant. The option not being declared, owing to the death of one of the defendants between the hearing and the judgment, on the application of the defendant, who was ordered to be dismissed, the court directed a separate decree to be drawn up as to that defendant. The death of a defendant between the hearing of the cause and the judgment, does not render a bill of revivor necessary prior to drawing up the decree. *Belsham v. Percival*, 8 Hare, 157.

2. *Costs of motion.*—Upon a motion by way of appeal from the Master's decision refusing to enlarge publication, the court received in evidence new facts not before the Master, on which the court directed the publication to stand enlarged; but as the order was obtained upon materials which were not before the Master, the appellant was ordered to pay the costs of the motion. *James v. Grissell*, 3 De Gex & S. 290.

3. *Exceptions—Injunction, bill for—Setting down exceptions.*—Where exceptions for scandal and impertinence had been taken by the defendant to a bill filed for an injunction, but he neglected to set them down for hearing, the plaintiff was allowed to set them down. Orders of court do not take away its general jurisdiction. *Coyle v. Alleyne*, 20 Law J. (N. S.) Chanc. 424.

4. *Replication.*—A creditor's suit against a personal representative for the administration of a testator's estate proceeded to replication, when a decree was obtained in another creditor's suit against

the same personal representative for the same object. After the defendant had given the plaintiff in the first suit notice of the decree, the plaintiff threatened to proceed; and thereupon the defendant, upon a notice of motion, intituled only in the former cause, asked that the proceedings might be stayed. The court made an order in both suits, granting the injunction, and giving the restrained plaintiff liberty to tax the costs of the first suit and on the motion, and to go in and prove his debt and such costs in the second suit, but declined to direct that the costs should be paid out of the first assets. *Ladbroke v. Sloane*, 3 De Gex & S. 291.

PRODUCTION OF DOCUMENTS.—1. A defendant admitted that certain documents were in the possession of himself and W. C., his co-executor, and that others were in the possession of their joint solicitor; W. C. not being a party to the suit: Held, that an order for production could not be made against the defendant on such an admission. *Morrell v. Wootten*, 13 Beav. 105.

2. *Agents or trustees.*—During a revolution in Sicily, the revolutionary government sent two of the defendants, who were natives and inhabitants of Sicily, as envoys to this country, and afterwards remitted to them monies, which had been contributed by many thousands of the inhabitants of Sicily, with directions to purchase a steam-ship therewith; and the defendants applied the monies accordingly. The lawful sovereign of Sicily, after he had re-established his authority, filed a bill, claiming the ship, which still remained in the port of London. The defendants, in their answer, admitted the possession of documents relating to the matters in the bill, but said that they held them as the agents and on behalf of the persons who intrusted them with the monies, and submitted that, in the absence of such persons, they ought not to be ordered to produce the documents. The court, however, made the order, because the plaintiff represented the contributors of the monies; and the revolutionary government being at an end, the defendants had either ceased to be agents or trustees for any one, or had become agents or trustees for the plaintiff. *Sicilies (Two), King of, v. Wilcox*, 1 Sim. 301.

RAILWAY ACT.—*Compensation.*—Under an inclosure act some lands were allotted to a rector, who had a power of selling to pay the expenses. Under a railway act, compensation was made in respect of other lands of the rectory, and paid into court. The court sanctioned the application of the money in court to the payment of the expenses of the inclosure. *Lockwood, Ex parte, Oxford, Worcester Railway Company, In re*, 14 Beav. 158.

RAILWAY.—1. *Contract, construction of.*—A plaintiff sued, as one of the public, to restrain a railway company from closing it: Held, that such a suit could not be maintained. Upon the construction of a contract between an individual and a railway company: Held, that nothing had taken place which could give him a right to use horses as the moving power against the will and consent of the

company. *Thorne v. Taw Vale Railway and Dock Company*, 13 Beav. 10.

2. *Powers of—Application of shareholders.*—In a railway company there were two classes of shareholders. A general meeting authorized the directors to apply to parliament for an act, which would very materially alter the existing rights and interests of the two classes inter se: Held, that such an application was not a breach of trust or duty, and that to hold otherwise would be applying too strictly to a railway company the principles admitted to be applicable to private partnerships, resting on private contracts unconnected with public duties and interests, and capable of dissolution. Upon the application of a shareholder of one of such two classes for an injunction to restrain the application to parliament, and the use of the corporate seal and the application of the corporate funds for that purpose, the court refused to restrain the application to parliament, or the use of the corporate seal for that purpose, but restrained the application of the funds and monies of the company towards the payment of the costs. *Stevens v. South Devon Railway Company*, 13 Beav. 48.

3. *Company—Lands Clauses Consolidation Act.*—The time within which a railway company was authorized to take lands expired on the 4th of August, 1848. Long before this period, they gave notice to a landowner to treat, and afterwards delivered to the plaintiff, to whom the lands had been in the meantime devised, a bond, and paid the estimated value of the lands comprised in the notice into the Bank, under the Lands Clauses Consolidation Act, 1845, s. 80. Under an amendment act, the powers of which extended beyond 1848, the company were authorized to take the land included in the notice; and on August 3rd, 1848, they gave notice to the plaintiff that, in pursuance of the powers of both these acts, they intended to take the lands. After the 4th of August, 1848, but without taking any further steps under the act, the company entered upon the land. On a motion for an injunction, the court declined to interfere, on the ground that, although the company might not be then entitled to take possession under their compulsory powers, they were able, by some proceeding under the second act, to obtain the land; and the motion was ordered to stand over, with liberty to the plaintiff to bring an action. *Williams v. South Wales Railway Company*, 3 De Gex & S. 354.

4. *Mortgagee.*—A bill by a railway company to compel a mortgagee of shares not standing in his name to pay the calls cannot be sustained. A. advanced money to B. on the security of railway shares. They were transferred into the name of C. to secure A., and subject thereto for B. C. died insolvent: Held, that A. was not liable, at the suit of the company, for the arrears of calls on the shares. *Nervry Railway Company v. Ross*, 14 Beav. 64.

5. *Motion.*—It appeared very probable that, at the time of the filing of the bill, a company, which was authorized to make 150 miles of railway, intended to complete twenty-three miles only, and then abandon the rest. Upon a motion to restrain them, it appeared that

the company had since abandoned the whole. The court was of opinion that, if the case had remained as it was at the time of the filing of the bill, the plaintiff would have been entitled to the injunction, but refused it, on the ground of the alteration in the existing circumstances, and gave no costs. It is improper and wrong for railway companies to embark their funds in other railway undertakings; and they have no right to engage or pledge their funds or entangle their affairs in unauthorized transactions, upon the speculation that they may obtain parliamentary authority for doing acts which are beyond their powers at the time when they are done. The court knows nothing of the intention of an act of parliament, except from the words in which it is expressed, applied to the facts existing at the time. Motion to restrain a company from declaring a forfeiture of shares, by reason of the nonpayment of calls, alleged to be made for illegal purposes, refused, although it appeared that the directors had conducted the proceedings, in many particulars, in a very improper manner, it being sworn that money was wanted to satisfy existing legal obligations of the company, and it being denied that the company sought to enforce the calls for illegal purposes. *Logan v. Courtown (Earl of)*, 13 Beav. 22.

6. *Company, powers of.*—It has not been yet settled to what extent, or subject to what particular limitations, the jurisdictions of the court ought to be exercised in preventing or checking the erroneous conduct of corporations created by act of parliament for public purposes; but the classes of cases, in which this court has been called on to interfere, arise from a combination, first, of acts illegal as to the public; secondly, breaches of contract with the subscribers; and thirdly, acts incapable of being rectified by the shareholders themselves in the exercise of their own powers. It is necessary in such cases to distinguish between the duty of the governing body to the public, and their duty to their shareholders. After the expiration of the time for completing a railway, which by their act the company were "required" to make, a bill was filed by a shareholder, seeking to restrain the company from making any dividend until the whole of the works had been completed. A general demurrer was allowed, on the ground that the non-completion being a public wrong, the court had not jurisdiction to interfere; and that the misapplication of the income was the subject of internal regulation. This court does not attempt to direct the performance of all the duties which the governing bodies of such companies owe to the shareholders, but, on the contrary, leaves to the companies themselves the enforcement of all the duties which the governing bodies of such companies owe to the shareholders; but, on the contrary, leaves to the companies themselves the enforcement of all the duties arising out of matters which are the subject of internal management. It cannot be safely said that in no case whatever joint-stock companies ought to be allowed to divide any profits or receive any tolls until all their works have been completed. Disapproval of the practice of filing demurrers in railway cases on mere

formal and technical grounds. *Browne v. The Monmouthshire Railway and Canal Company*, 13 Beav. 32.

RECEIVER.—1. *Sheriff—Fieri facias—Rent—Action, application to stay.*—Upon an action by the sheriff, who was no party to the suit, the court refused to restrain the plaintiff from prosecuting an action at law against him to obtain payment of a sum of money reserved for rent, which the sheriff, upon the stay of the action, offered to pay into court, and which was part of a larger sum of money levied under a writ of fieri facias issued upon a judgment obtained in an action at law by a stranger against the tenant of the estate, which the plaintiff in this suit claimed, and over which a receiver had been appointed. *Trye v. Trye*, 20 Law J. (N. S.) Chanc. 368.

2. *Subsequent proceedings.*—Where the expenses of attending the passing a receiver's accounts are large, the court will direct the accounts to be passed once a year only. In the absence of directions made at the hearing of a cause, the court will not, upon an interlocutory application, make any order to restrain the defendants, though very numerous, from attending the subsequent proceedings in the cause, though the result would be a very large saving to the estate of the testator. *Day v. Croft*, 20 Law J. (N. S.) Chanc. 423.

RENTS.—*Apportionment.*—By indentures, dated in 1828, certain lands were settled on A. for life, and a power of leasing was given to A. The Apportionment of Rents Act was passed in 1834. After 1834, A., under his power, granted leases of divers portions of the settled property. A. died in 1849: Held, that A.'s personal estate was entitled to a proportion of the rents of the lands, of which he had granted leases under his power, between the last days of payment of rent and his death. *Lock v. De Burgh*, 20 Law J. (N. S.) Chanc. 384.

REVIVOR.—When a defendant dies, his executors cannot compel the plaintiff to revive, or, in default, have the bill dismissed. *Reeves v. Baker*, 13 Beav. 115.

SETTLEMENT.—*Power to appoint new trustees—Construction of Trustee Act, 1850—Vesting order.*—The ordinary words, "becoming incapable," in a power to appoint new trustees of a settlement, do not include the case of a trustee who becomes bankrupt, absconds, and goes out of the jurisdiction of the court. In cases where a new trustee is appointed under the Trustee Act, 1850, to act jointly with continuing trustees, the provisions of the act in respect of vesting orders are inapplicable, and the proper order to make is for the person approved of by the Master to convey the trust property to the new and continuing trustees. *Watts, In re*, 20 Law J. (N. S.) Chanc. 337.

SOLICITOR.—1. *Order made ex parte.*—A sum being, on taxation, found due from a solicitor to his client, the first order fixing a day for payment must be obtained on notice; but the second or fourth order is made ex parte. *Stevenson, In re*, 14 Beav. 27.

2. *Costs*.—By an order of the court, the costs to be incurred by a married woman, suing by her next friend, in a future proceeding, were ordered to be paid to A. B., a solicitor. Pending the proceedings, A. B. was discharged, and C. D. appointed solicitor. A. B. received the whole costs: Held, that the court had jurisdiction, on petition, to order A. B. to pay over to C. D. his share of such costs: and secondly, that A. B. could not set off, as against the amount, a debt due to him from the next friend. *Bailey and Hope, Ex parte*, 14 Beav. 18.

3. *Taxation—Costs*.—A solicitor, who sold his business, but who continued to conduct a suit in Chancery in the office, as the agent of one of the plaintiffs, independently of the solicitor who had purchased the business, will not be allowed to deny his agency, or to strike from the bills of costs of proceedings which had been incurred by a mistake made in conducting the cause; and a petition for the taxation of the bills of costs, under special circumstances, was dismissed with costs. *Gedge, In re*, 20 Law J. (N. S.) Chanc. 411.

SOLICITOR AND CLIENT.—*Residuary legatee*.—A gross sum was paid to a solicitor in discharge of his claim; but no bill of costs was delivered: Held, that the client was entitled to have a bill of costs delivered. The solicitor of trustees and executors received payment of his bill of costs out of the estate: Held, that a residuary legatee was entitled to have a copy of the bill delivered, on payment of the costs of it. The court, notwithstanding there was such pressure or such allegations and proof of overcharges as have been usually relied on in such cases, ordered the taxation of a solicitor's bill after payment. *Blackmore, In re; Billing, In re; Spike, In re*, 13 Beav. 154.

SPECIFIC PERFORMANCE.—1. *Assignment—Sale of railway shares*.—A shareholder in an incorporated railway company instructed a stockbroker to sell his shares. The broker agreed with a jobber for the sale of them; but the name of the purchaser was not mentioned. The jobber had been instructed to purchase by B. (another broker), who, as the jobber knew, was not purchasing on his own behalf. B. afterwards requested time for completion, his principal not being ready; and the jobber granted the time to B., giving his own name as that of the principal. A deed of assignment was prepared from the vendor to B., who paid the price to the vendor, and took the deed of assignment executed by the vendor: Held, upon a bill filed by the vendor, that B. was bound to execute the assignment, to procure himself to be registered, and to pay the calls made since the execution of the assignment by the vendor, and to indemnify the vendor against future calls; and a decree was made to that effect. *Wynne v. Price*, 3 De Gex & S. 310.

2. *Costs—Evidence*.—A purchaser of lands under the description of "partly freehold and partly leasehold," is entitled to have the boundary dividing the freehold from the leasehold defined, by reference to the instruments of title, or shown to be capable of being so

defined; but the circumstance that the property is described in the agreement as partly freehold and partly leasehold, the boundaries distinguishing the one from the other not being therein, and having not theretofore been clearly defined, is not an objection to a decree for specific performance. The uncertainty in the boundary or extent of property, which arises, not from an instrument being incapable of legal construction, but from its not having theretofore received any such legal construction, is not a ground for refusing specific performance of a contract to sell such property. If the boundary of property contracted to be purchased can be certainly defined, whether the extent be more or less, the purchaser will be bound by the contract; but whether he will be so bound if the boundary depends on a plan or instrument which is so vague as not to admit of legal construction, *quære*. A contract by a lessee under an ecclesiastical corporation, whilst he was in treaty with the corporation for the renewal of his lease, to sell the leasehold premises, does not necessarily throw upon him the obligation for procuring the renewal of the lease at his own expense, for the benefit of the purchaser; whether, if the vendor, after the contract, procure such renewed lease, the purchaser is not entitled to take it without bearing the expense of the renewal—*quære*. Although a good title was not shown by the vendor until during the pendency of the reference, the court held that the purchaser must nevertheless bear the costs of the suit, it being manifest, that, if the particular evidence which completed the title had been produced before the bill was filed, yet the suit would not have been avoided. *Monro v. Taylor*, 8 H. 51.

3. *Demurrer*.—Courts of equity will not lend their assistance to enforce the specific performance of ordinary contracts for the sale and purchase of chattels, unless there be something very special in the nature of the contract. On the other hand, if a trust be created, the circumstance that the subject-matter is a personal chattel will not prevent this court from enforcing the due execution of that trust. Trusts may be constituted, not merely by direct declaration of trust, but also by the constructive operation of the consequences flowing from the acts of parties. Thus equity will enforce the execution of a trust, not only against the trustees themselves, but against all persons who obtain possession of the property affected by the trust, provided they had notice of it. A., who sold 500 tons of iron, stacked on his wharf, to B., in consideration of a bill accepted by a third party, gave an acknowledgment engaging to deliver it to the bearer, he (A.) "having been paid for the same." B. mortgaged the iron, and the bill having been dishonoured, A. refused to deliver the iron. The mortgagee proceeded in equity to make A. responsible for the iron: Held, that A. had no ownership or property in the iron so stacked, and was a trustee, and therefore a demurrer for want of equity was overruled. *Pooley v. Budd*, 14 Beav. 34.

4. *Injunction*.—The landlord of a workshop, which he held under a lease, agreed in writing to underlet it at an yearly rent, with an option to the tenant to take an underlease upon the same terms for

twenty-one years from the previous Lady-day. The tenant continued in possession under this agreement for four years, when he received notice to quit. He then applied to his landlord for a lease for twenty-one years, according to the agreement. Some months afterwards, the landlord obtained possession of the premises under a warrant of possession from a district court. The tenant filed a bill against the landlord for specific performance and an injunction. It appeared at the hearing that the tenant had not kept the premises in repair. The court dismissed the bill with costs, and expressed a doubt whether the plaintiff had not, by his delay alone, lost his option to renew. *Nunn v. Truscott*, 3 De Gex & S. 304.

SUBSTITUTED SERVICE.—*Writ of summons.*—Substituted service ordered of a writ of summons issued upon the Master's certificate upon a claim. *Baker v. Anthony*, 14 Beav. 26.

TIME TO ANSWER.—*Appeal.*—Bill filed 9th of February; time to answer expired on the 30th of March, when a month's time was given. A second application for time was refused by the Master on the 3rd of May, but, on appeal, three weeks were given by the court on the 22nd of May. On applications for time to answer, it must be considered that the answer is necessary, not only for giving a discovery to the plaintiff, but to enable the defendant to state the nature of his defence to the suit. *York and North Midland Railway Company v. Hudson*, 13 Beav. 69.

TRUSTEE.—*Evidence.*—Trustees had lent money on a technically insufficient security. In the Master's office they entered into evidence to prove its insufficiency, but failed, and they afterwards presented a petition for calling in and investing the money. This was done, and no loss occurred: Held, that the trustees were entitled to their costs of both proceedings. *Royds v. Royds*, 14 Beav. 54.

TRUSTEE AND CESTUI QUE TRUST.—Under a power enabling a surviving or continuing trustee to appoint a new trustee in the place of a trustee dying, going to reside abroad, becoming incapable of acting, &c., the surviving trustee, although himself residing abroad, may appoint another trustee in the place of the one deceased. Although taking up his permanent residence abroad in such a case does not ipso facto deprive a trustee of his office, yet it is such a disqualification as entitles the cestuis que trust to have a new trustee appointed in his place. It is the duty of trustees, having power to appoint new trustees, to make such appointment impartially as between their cestuis que trust, and not without communication with them. *O'Reilly v. Alderson*, 8 H. 191.

VENDOR AND PURCHASER.—One notice of motion to confirm the Master's report of best purchaser, and to pay the purchase-money into court, is irregular. *Duffield v. Elves*, 13 Beav. 85.

WESLEYAN CHAPEL.—*Mortgages.*—The trust deeds of certain Wesleyan Methodist chapels contained powers of raising money by mortgage, for the purposes of the trusts: Held, that any

of the trustees of the chapels might be mortgagees under this power, and that if they were such mortgagees they might exercise all the rights of mortgagees, although in opposition to the trusts. *Attorney-General v. Hardy*, 1 Sim. 338.

WILL.—1. Construction—“Estate and effects.”—Gift, devise and bequest (since the Wills Act) to A., without words of limitation, of all the testator's estate and effects whatsoever and wheresoever, and of what nature or kind soever, to be paid, assigned or transferred to him on attaining twenty one, and in the meantime the interest, dividends or proceeds thereof, or so much of the principal thereof as should be necessary, to be applied, in the discretion of the executors, for his maintenance, education and advancement. Appointment of executors and guardians, with power to invest the testator's estate and effects on real or personal security, to change the investments, to reimburse themselves out of his said estate and effects, and to give receipts. In the event of A. not attaining twenty-one, gift, devise and bequest to the executors or the survivor of them (without words of limitation) of all the testator's aforesaid estate and effects: Held, on special case, that the testator's after-acquired real estate (consisting of copyhold hereditaments) passed by the general devise in his will. *Stokes v. Salomons*, 20 Law J. (N. S.) Chanc. 343.

2. Construction—Revocation.—A testator by his will devised his real estate to A. and B. in fee, on certain trusts, and by a codicil appointed C. “to be a trustee and executor of his will in the place of A.,” whom he did not wish to act as executor: Held, that the codicil acted as a revocation of the devise made to A. by the will. *Hough's Estate, In re*, 20 Law J. (N. S.) Chanc. 422.

3. Representatives.—Bequest to H. S. for life, and, after her decease, to the testator's four brothers and sisters, “or such of them as should be then living,” equally; and in case any of them should be then dead, then he bequeathed the deceased child's share to the children, “to be paid at the time before mentioned.” The brothers and sister all died in the lifetime of H. S., one (A. B.) having had no children: Held, that the representatives of A. B. were entitled to his share, and that all the children took, whether living at the death of H. S. or not. *Masters v. Scales*, 13 Beav. 60.

WINDING-UP ACTS.—1. Held, that the circumstance of a provisional committee-man never having attended a meeting of the committee was not sufficient to distinguish his case from Besly's, to which it was in other respects similar. *Hole's Case*, 3 De Gex & S. 241.

2. Where the circumstances of the case rendered it doubtful whether there ever had been such a company as that sought to be wound up, the court referred it to the Master to inquire whether the alleged company ever existed; and if it had existed, whether it was proper that it should be wound up. *North Western Trunk Company*, 3 De Gex & S. 266.

3. *Company*.—An order had been made to wind up a company, but no person had been placed on the list of contributories, and no creditor had made any claim. On the application of directors (who were the holders of 6490 out of 7325 shares), the consent of the official manager and original petitioner, and evidence that the remaining shares could not be heard of, and that the petitioners had paid, in respect of liabilities of the company, more than the amount of the assets in the hands of the official manager, the court ordered that amount to be paid to the petitioners on their undertaking to account for it, and stayed all proceedings under the winding-up order. *Worcester, Tenbury and Ludlow Railway Company, In re*, 3 De Gex & S. 189.

4. *Same*.—Where by a deed of a company, the responsibility of transferrors of shares is, as between them and the company, determined by the transfer, their possible liability to contribute inter se, in the event of demands of creditors being enforced against any of them, is not sufficient ground for placing a transferrer upon the list of contributories, in a case where no transferrer is active in making or supporting an application for that purpose. *Royal Bank of Australia and Joint Companies Winding-up Acts, Sutton's case, In re*, 3 De Gex & S. 262.

5. *Company*.—*Dissolution of partnership*.—B. was one of the projectors of a banking company, and concurred in issuing a prospectus containing regulations, one of which was, that a deed of settlement should be prepared. Several meetings of the proposed directors took place, at which B. took the chair, and at which the terms of the deed of settlement were discussed; but before the deed was executed by any one, disputes arose between B. and other directors, and it was agreed that the former should retire and cease to be a member of the company. The deed was afterwards executed, at various times, by other members, and contained a clause whereby the parties thereto ratified all facts, contracts, deeds, matters and things, up to the time of its execution done, executed and performed by the directors. After the execution of the deed, the dissolution of partnership between B. and the company was advertised. On the company being wound up several years afterwards: Held, that the ex-chairman was not properly included in the list of contributories. *St. Marylebone Joint-Stock Banking Company, In re*, 3 De Gex & S. 267.

6. *Compromise*.—*Costs*.—Where, upon a petition for an order under the Winding-up Act, it did not appear that there existed any debt or liability of the company, or that the petitioner had sustained, or was likely to sustain, any loss in respect of any debt of the company, and no assets were shown to exist, except such as might arise by compelling the directors to make good monies expended by them in purchasing shares to enhance the price of them in the market: Held, not a proper case for an order; and the transactions complained of having occurred five years before the presentation of the petition, and having been the subject of an investigation and a suit instituted four years previously, and compromise; and also of another petition

which had been abandoned on a compromise; and the new petition was dismissed with costs. *Inderwick, Ex parte*, 3 De Gex & S.

7. *Ex parte motion*.—Where a winding-up order had been obtained by a petitioner, who abandoned it, upon a compromise with the directors, before carrying it into the Master's office, the court gave the prosecution of the order to a second petitioner; and on the death of such second petitioner before he had taken any further step in the matter, the court, upon an *ex parte* motion, gave the carriage of the order to another shareholder. *Larne, Belfast and Balmena Railway Company, Ex parte, Baker*, 3 De Gex & S. 242.

8. *Petition—Company*.—The affidavit of service of a petition to wind up a company under the winding-up acts, must state or show that the person on whom it has been served is a member, officer, or servant of the company; and it is not sufficient to state that he is a member of the provisional committee. *London and Dublin Approximation Railway Company, In re*, 3 De Gex & S. 208.

9. *Preliminary inquiry*.—Upon a petition to wind up a company under the winding-up acts, a preliminary inquiry was directed as to the expediency of making the order, although the petition was unopposed. *Great Eastern and Western Railway Company, In re*, 3 De Gex & S. 219.

WINDING UP ON PETITION OF A CONTRIBUTORY PLAINTIFF IN EQUITY.—This court will make the usual order for winding up the affairs of a company on the petition of a plaintiff in a suit against the directors for a similar object, without requiring the petitioner to pay the costs of the suit, leaving the question of the costs of the suit to be considered in the suit. *Basterne Bitumen Company, In re*, 3 De Gex & S. 265.

PRIVY COUNCIL.

Containing the Cases in 6 Moore's Reports, part 3.

APPEAL IN FORMA PAUPERIS.—Leave to appeal in formâ pauperis allowed, and sureties for prosecuting appeal dispensed with. *Bronard v. Dumaresq*, 6 Moore, 413.

ASSIGNEE.—Extension of term of letters-patent granted to assignees of patentee. The inventor and patentee had lost largely by the patent; but his assignees had lately made very considerable profits, and from their position in the trade were likely to command a very large sale of the patent article. The patent was of high merit, and of great service to the public safety. In such circumstances a prolongation of the term was granted to the assignees for four years, upon conditions, first, that the assignees secured to the patentee half the profits derived from the sale; and secondly, that the patented article should be sold by the assignees to the public at a certain fixed price. In estimating the profits made under a patent, the profits arising from the sale of the patented article for exportation must be included. *Hardy's Patent, In re*, 6 Moore, 441.

CHARTER-PARTY.—*Demurrer.*—In an action on a charter-party, the declaration stated that, by a charter-party made between the defendant, the shipowner, and the plaintiffs, it was agreed that the ship should proceed to two ports in Sicily, or usual place of loading, on and after the delivery of her outward cargo, and there load from the plaintiff's factors a full cargo, and thence proceed to Bristol, and that the vessel should have her orders before leaving Messina. The declaration, after containing averments that the ship arrived at Messina, and a general allegation of performance by the plaintiffs, laid, as a breach, that the defendant, within a reasonable time after the delivery of her outward cargo, and before the plaintiffs could have given orders for the ship to proceed to the said ports, made a contract with a third party for the conveyance of goods from Messina, and therewith and within such reasonable time as aforesaid, and before such reasonable time had elapsed, loaded his ship, and afterwards proceeded to London, without taking on board the cargo agreed to be taken from the plaintiffs, and thereby wholly incapacitated and deprived himself of the power of fulfilling the charter-party, although the plaintiff, within such reasonable time as aforesaid, provided mer

chandize, and were ready and willing to load on board the said ship the said merchandize; and although the plaintiffs would have been ready and willing to have named and appointed and given orders to the defendant to proceed to two ports, and to have there loaded a full cargo: Held, on general demurrer, that the declaration was bad, as it did not show that the vessel had sailed before the lapse of a reasonable time for the performance by the plaintiffs of their part of the contract, and so did not show that the defendant had incapacitated himself from performing his part of the contract; and that it ought to have contained an averment that the plaintiffs had performed their part by giving orders, &c., and by tendering a cargo within such reasonable time. *Matthews v. Lowther*, 6 Moore, 574.

COMMERCIAL CONTRACT.—*Statute of Frauds.*—By the Canadian Act, 25 Geo. 3, c. 2, passed by the legislature of Lower Canada, for regulating proceedings in the courts of justice in Canada, it is enacted, that, in proof of all facts concerning commercial matters, recourse should be had by the courts of civil jurisprudence in the provinces to the rules of evidence laid down by the laws of England: Held, by the Judicial Committee, affirming the judgment of the Court of Appeals for Lower Canada, that this colonial act revoked so much of the old French law, which formerly prevailed in Canada, and was laid down in the Ordonnance de Moulens, passed in the year 1566, and subsequently altered by the Ordonnance of 1667, whereby parol evidence was excluded from the proof of all contracts or matters exceeding the sum of 100 livres, except in the case of accident, or where there was a commencement in writing; and that the English law, as to the admission of parol evidence in commercial matters, was substituted. A contract entered into by persons in Canada with the government commissioner to supply stone for making a canal is a commercial matter, and is to be proved by the English law. An agreement entered into by a contractor to share in the profits of the undertaking, although the contract was not capable of being completed within a year, is not such an agreement as, by the Statute of Frauds, 29 Car. 2, c. 3, s. 4, is required to be in writing, but may be proved by parol evidence. *M'Kay v. Rutherford*, 6 Moore, 413.

DIVORCE.—Husband and wife separated by mutual consent, in consequence of the conduct of the husband towards the wife, which in itself amounted to legal cruelty. The wife afterwards sued in the Arches Court for restitution of conjugal rights, and by virtue of a decree of that court the parties again cohabited, when the husband renewed his acts of cruelty towards the wife, who continued to cohabit with him notwithstanding for six months. Upon a suit brought by the wife for a divorce, by reason of cruelty, such divorce decreed; the Judicial Committee, in affirming the sentence of the Arches Court, holding that the former cruelty was revived by the subsequent acts, and was not condoned by the cohabitation enjoined by the sentence for restitution of conjugal rights. *Wilson, Appellant, and Wilson, Respondent*, 6 Moore, 484.

JUDGE.—Order of suspension.—The governor and council of a colony or plantation have power, under the statute 22 Geo. 3, c. 75, to remove a judge from his office for misbehaviour or neglect of duty. Where a judge availed himself of his judicial office, through an incident connected with the constitution of the Supreme Court in Van Diemen's Land, to obstruct his creditor from recovering a debt due to him, and, upon an investigation by the governor and council, was found to be involved to a large extent in bill transactions and pecuniary embarrassment: Held, by the Judicial Committee, sufficient to justify the governor and council in removing him from office. The motion was made under an order of the governor and council, calling upon the judge to show cause why he should not be suspended from office: Held, also, that although that there was some irregularity in pronouncing an order for motion, when the judge had only been called upon to show cause against an order of suspension, yet that, as the facts justified the order of motion, and the judge had sustained no prejudice by such irregularity, the order of motion ought not to be reversed. *Montague v. Lieutenant-Governor of Van Diemen's Land*, 6 Moore, 489.

JURISDICTION.—Court of Chancery.—The colony of the islands of Bermuda was settled by a chartered company of adventurers under a grant from King James the First. Under the government of this company, three officers were appointed for the local administration of the islands, namely, a sheriff, secretary, and provost-marshal. Each of these officers were paid partly by fees, and partly by grants of certain parcels of public lands made to each officer respectively. In 1688 the company was dissolved, and their charter evicted, and the government of the islands became absolutely vested in the crown. From that period one person only had been appointed to perform the duties of the three offices, and the crown appropriated these emoluments, and made certain alterations from time to time in their amount. This state of things continued down to the year 1819, when the office of provost-marshal was separately appointed, and some division of the lands was made. In 1839 the respondent was appointed provost-marshal; and in 1846 he filed a bill in the Court of Chancery in the island against the secretary of the island, for an account of the rents and profits of the lands and other monies received by him in respect thereof, as appertaining to the office of sheriff, which office was included in that of provost-marshal. The court at Bermuda sustained the bill, and ordered an account to be taken: Held, reversing such decree, that, supposing a right to exist in the respondent, the Court of Chancery had no jurisdiction to entertain such a suit, as such right or title to the office of sheriff was not then of an equitable nature; and *semble*, the only ground for coming into chancery was the existence of several offices in one individual during a long series of years, and a consequent confusion of boundaries of the lands respectively allotted to the several offices. *Kennedy, Appellant, and Trott, Respondent*, 6 Moore, 449.

PATENT.—1. *Extension not granted.*—A patentee entered into an agreement with certain parties to work the patent, but owing to disputes between them, the invention was not prosecuted until a short time before the expiration of the term of letters-patent; in such circumstances an extension was refused. *Patterson's Patent, In re*, 6 Moore, 469.

2. *Term, extension of, granted.*—Where the executor of the surviving assignee of a patentee petitioned for an extension of the term of the letters-patent, and it was established that a valuable consideration had been given for the assignment, and that the assignee had sustained considerable loss, the Judicial Committee, in granting an extension of the term, refused to impose terms upon the petitioners in favour of the patentee. *Bodmer's Patent, In re*, 6 Moore, 468.

PRACTICE.—1. Bounties awarded under the statute 6 Geo. 4, c. 49, to the commander, officers and crew of her majesty's ship Samarang, upon the capture and destruction of piratical prahus in the Straits of Gilolo, in respect of the piratical crew on board the prahus. Leave to appeal against an interlocutory decree of the Admiralty Court awarding such bounties, granted to the admiralty proctor on behalf of the crown, notwithstanding an appeal had not been interposed within due time, the circumstances of the case entitling the appellants to such indulgence. *Reg. v. Belcher*, 6 Moore, 271.

2. After the institution of an appeal from the Arches Court, in a suit against a clergyman for adultery, fornication or incontinence, this court refused to receive additional articles charging acts of adultery alleged to have been committed subsequently to the close of the case in the Arches Court, or to examine *vivâ voce* the witnesses examined in the court below, upon the allegation that they had been tampered with previous to their examination. *Craig v. Farnell*, 6 Moore, 446.

3. *Compensation.*—Parties to an appeal agreed to compromise the same, and that the appellant should have paid over to him a certain sum of money, the amount of compensation, in respect of slaves attached to an estate, the subject of the appeal. Upon petition to dismiss the appeal, an order of dismissal made, containing also an order for the accountant-general of the Court of Chancery to pay to the appellant the compensation money in question. *McTurk v. Douglass*, 6 Moore, 500.

SIGNED AT THE FOOT OR END.—*Will invalid.*—The words "signed at the foot or end thereof," in the 9th section of the Statute of Wills, 1 Vict. c. 26, are to be construed strictly. Therefore, where a holograph will, written on a sheet of foolscap paper, the dispositive part of which ended on the third side, leaving at the foot or end of the third side a space sufficient to have received the signature of the deceased and also that of the two attesting witnesses, if not accompanied by a formal attestation clause, was signed with an attestation clause in the middle of the fourth side, no part of the

will being immediately above it: Held not to have been signed "at the foot or end" according to the requisites of the statute, and the will declared invalid. *Smee v. Bryer*, 6 Moore, 404.

SLAVES.—3 & 4 Will. 4, c. 73—*Compensation for loss of service.*—Testator, resident in Jamaica, and seised of plantations and slaves in the island, by his will, dated June, 1834, after giving certain bequests, proceeded as follows:—"Also I give, devise and bequeath, share and share alike, unto R. and her children, all my right, title and claim to compensation such as may be awarded to me as my portion of the compensation-fund for the emancipation of such slaves as may belong to me and be living on the 1st August, 1834." This will was not attested so as to pass real estate, but was properly executed to pass personalty. By the law of Jamaica slaves could only be directly devised as real estate. The Act for the Abolition of Slavery (3 & 4 Will. 4, c. 73, passed on the 28th of August, 1833,) provided that on the 1st of August, 1834, slavery should cease in the British dominions, and gave to the owners of the slaves a right to their services as apprentices, and to compensation for the loss of their services as slaves. The testator died before this period of manumission arrived. The court in Jamaica decreed that the compensation money partook of the nature of real estate to the same extent as the slaves, and did not pass under the will. Upon appeal, Held, reversing such decree, that (treating the slaves as real estate) the legislature became purchasers under the 3 & 4 Will. 4, c. 73, from the date of the act, giving a limited interest in the slaves for a term of years to the vendor, and that the money to be received under the compulsory sale of the slaves was converted into personal estate and passed to H. and her children as specific legatees under the will. Although the testator's will was inoperative as to the real estate, the executors took possession of the real estate, and filed a bill of interpleader against R. and her children, and the heiress-at-law of the testator, for the administration of the compensation fund: Held, that the suit was improperly brought, as the question could have been determined by the commissioners of compensation, and the executors refused their costs out of the fund. Where costs had been improperly paid out of the compensation fund, the reversal of the decree was made without prejudice to the right of the legatees taking proceedings for the recovery of the fund. The rules made in pursuance of the act, and when allowed by her majesty in council declared to have the same force and effect as the act, must, when made, be construed with reference to the provisions of the act itself; the second and fifth rules of the commissioners of compensation to be construed and applied upon this principle. *Richards v. Attorney-General of Jamaica*, 6 Moore, 381.

TOWAGE.—*Judicial Committee.*—A steam-tug entered into a verbal agreement with the master of a vessel having a licensed pilot on board to tow her to London. In coming up the river they came across a brig near a tier of vessels. The pilot hailed the tug to go

to the westward of the brig; but the master of the tug disobeyed the order and went to the eastward, and thereby caused a collision between the vessels. The tug afterwards completed the towage and brought the vessel to her destination: Held, in such circumstances, that the disobedience of the orders of the pilot was not justifiable, and that the towage was forfeited. *Quære*, whether, notwithstanding such misconduct, the tug could recover towage from the owners of the vessel under the contract, and leave the vessel towed to a cross-action for the damage. This question not having been properly raised or discussed in the Admiralty Court, the Judicial Committee, sitting as a court of appeal, refused to entertain it. *Petley v. Catto*, 6 Moore, 371.

WILL.—*Undue influence.*—The principles expounded in the cases of *Paske v. Ollatt* (2 Phill. 323), and *Barry v. Butlin* (2 Moore's P. C. Cases, 480), that the burden of proof lies upon the party propounding a will, and that the court is not bound to pronounce in favour of a will, unless it is judicially satisfied that it is the last will of a free and capable testator, considered and affirmed. The execution of a will by a competent testator being duly proved, the presumption is that the testator was cognizant of its contents, and that the instrument expresses his will, unless there be other circumstances to lead to a different conclusion, or to render it doubtful for the court to act upon that presumption. Exaggeration of the conduct of a party benefited by a will towards the testatrix, though it induce her to revoke the will and the bequest made in his favour, and to execute another will to his exclusion, is not such a fraud as to destroy free agency and render the will valid. Neither does such conduct amount to undue influence or importunity. *Browning v. Budd*, 6 Moore, 430.

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